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LAWS OF ENGLAND

BEING A  
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*MOST EMINENT LEGAL AUTHORITIES*

UNDER THE GENERAL EDITORSHIP OF  
A. WOOD RENTON, M.A., LL.B.  
OF GRAY'S INN, AND OF THE OXFORD CIRCUIT, BARRISTER-AT-LAW

VOLUME X  
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*1st July* 1898.



### ERRATUM.

MONROE DOCTRINE (*Authorities*).—For Catellani, Cambridge, 1898, read Reddaway, *The Monroe Doctrine*, Cambridge, 1898 ; Beaumarchais, *La Doctrine de Monroe*, Paris, 1898.

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### ADDENDUM.

For PERQUISITION, substitute the following :—

PERQUISITION (French Law)—A word used to describe a search for a document among the private papers of any person, *e.g.* by a judicial official for a will, or by the police for incriminating documents among the private effects of an accused person.







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# ENCYCLOPÆDIA

OF

## THE LAWS OF ENGLAND

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**Peerage.**—The peerage of England is an Order of the State consisting of various ranks, whose members possess certain personal dignities or titles of honour, for the most part transmissible by descent, and carrying with them privileges not possessed by the Order of the Commons.

Excluding the separate peerages of Scotland and Ireland, existing before the unions of these countries with England, what is said in this article applies to the peerage of the United Kingdom of Great Britain created between 1707 and 1801, and to the peerage of the United Kingdom of Great Britain and Ireland created after that date.

The most important of the *privileges* above referred to is membership of the House of Lords (*q.v.*); but the distinction is clear between Lords of Parliament and members of the peerage. The spiritual lords have not since the seventeenth century been reckoned in the peerage, although in earlier periods they were equally peers with the temporal. So too, though life-peerages may be created, yet the Committee of Privileges held, in the *Wensleydale Peerage* case (1856), that this did not enable the grantee to sit in Parliament. Since the Appellate Jurisdiction Act, 1876 (39 & 40 Vict. c. 59, amended by 50 & 51 Vict. c. 70), however, the holder of such a peerage, if he is a Lord of Appeal in Ordinary, is by virtue of his appointment entitled to sit and vote in the House of Lords. See as to the "nomination by the style of Baron," HOUSE OF LORDS.

On these grounds it is held (see Professor Freeman, art. "Peerage," *Encyc. Brit.*) that the word "peerage," in its legal sense, should now be employed as meaning the hereditary temporal peerage only.

The ranks of this peerage are: (1) Dukes; (2) Marquises; (3) Earls; (4) Viscounts; (5) Barons; and though there is this distinction of rank, yet as all the members of the body possess the same political and legal privileges, they have on this account all been comprised under the general appellation of pares or peers from an early period. The first employment of the word in this sense (though at that time it included the lords spiritual) was in 1322 (see Lords' Report on The Dignity of a Peer of the Realm, vol. i. p. 281); and it arose out of the possession of the common privileges of all Lords of Parliament to be tried by their fellow lords only.

Thus the only distinction which exists amongst the peers is one of precedence (*q.v.*)

On the other hand, their privileges of every kind are personal to the



peers themselves, and do not extend to their families. The "ennoblement of blood" is a doctrine whereby the distinction between the hereditary peers and the official peers in Parliament was emphasised. It was not nobility in the sense that a peer's family shared his privileges, and thereby was reckoned amongst the nobility and not amongst commoners.

The "corruption of blood" destroyed the succession to the peerage, but the holders alone being in possession of the privileges which distinguished nobles from commoners, its effect upon "nobility" was confined to them.

"The nobility of the blood is restricted to the bearer of the title, and does not extend even to his younger children" (Stubbs, *Const. Hist.* vol. iii. p. 443).

The peerage and the nobility are therefore, in England, synonymous terms.

The various ranks of the peerage are not of equal antiquity. In point of rank they descend according to the order in which the titles are given above. The baron was originally a peer by virtue of his barony (*q.v.*), and his peerage by writ was his more common title until 1387, when Richard II. created the first baron by patent. The creation of earls as an order unconnected with the older official title, which is of immemorial antiquity, was begun by Edward III. Dukes were created in the same reign, when the king's eldest son, the Black Prince, was made Duke of Cornwall, a dignity which descends to the eldest son of the sovereign. The title of marquis, which had in early periods been that of an officer of the Crown, began to be created under Richard II., in 1386, as a dignity; and a century later, in the reign of Henry VI., the dignity of viscount completed the ranks of the peerage, and no other has since been created.

The power of creating new orders of higher rank than the older, however, is assumed to exist, though the Lords' Report, vol. i. p. 370, throws doubt upon it, placing it on the same footing as the power to grant special patents of precedence amongst the peers, which was given up by the Statute of Henry VIII. (see PRECEDENCE). As in the case of the *Wensleydale Peerage*, the peers might exercise their powers of refusing admission to Parliament by the resolution or standing order of the House.

The right of the Crown to make peers at pleasure is a well-known constitutional doctrine, which, as far as England is concerned, has never been limited by statutory authority, as it has for the peerages of Ireland and Scotland (see HOUSE OF LORDS).

Peerages are created either by a writ of personal summons, that is, a summons not connected with a land barony (*q.v.*) to a person who is not a peer, requiring him to come and attend Parliament on a particular day (see the Form, p. 70, Cruise, *Origin of Dignities*), or by patent. By the writ of summons the dignity of a barony is conferred, but only after the person summoned has taken his seat in Parliament; so that if he dies before Parliament sits, he does not become a peer (see Black. *Com.* vol. ii., 11th ed., p. 616, and Cruise, p. 72).

The more usual way of conferring the dignity of all ranks of the peerage now, however, is by patent, whereby the dignity descends according to the limitations, though the grantee himself has never sat in Parliament.

As to the descent of the dignity of a baron when created by writ, see BARONY.

In the case of a peerage by patent, it descends according to the limitations; and in the absence of any particular limitations the dignity is only for life. The usual limitation is to the heirs-male of the body of the grantee; or it



may be the heirs-male by a particular woman; in some few it is limited, in default of heirs-male, to heirs-general, or to the eldest heir-female.

As to the acquirement of a peerage by marriage, see below as to peeress; and as to abeyance of a peerage, see *sub voce*, and BARONY and HOUSE OF LORDS.

Investiture (*q.v.*) used to follow upon the creation of a peerage by patent, but in the reign of James I. it was declared that the delivery of the letters patent was sufficient without any ceremony; and in the modern patents the public ceremony of investiture is dispensed with by express words.

Upon a new creation, or summoning by writ, peers are introduced to the House of Peers by two lords of the same rank as the new peer. All are in their robes, and are preceded by the Gentleman Usher of the Black Rod (*q.v.*) (or in his absence by the Yeoman Usher (*q.v.*)), by Garter King-of-Arms or Clarencieux King-of-Arms, or any other herald officiating for Garter, and by the Earl Marshal (*q.v.*) and Lord Great Chamberlain; but it is not necessary that the two last should be present. Being thus introduced, the new peers are conducted to their seats according to their dignity (May, *Parliamentary Practice*, 10th ed., p. 150; and see PRECEDENCE).

The Crown being the fountain of honour, may confer dignities on any person whatever, even an alien (Cruise, pp. 91 and 92); but alienage is a disqualification for sitting in either House of Parliament (HOUSE OF LORDS).

It is said that a person cannot refuse or waive a dignity conferred by the Crown (4 *Inst.* 44).

All dignities are now absolutely unalienable. Formerly it was held that they could be surrendered to the king; but it was resolved in the House of Lords, in the case of the *Barony of Grey of Ruthyn*, that no peer of the realm can drown, or extinguish, his honour, but that it descends to his descendants, neither by surrender, grant, fine, nor any other conveyance to the king; and in the *Purbeck Peerage* case, 1675, Show. P. C., it was resolved to the same effect.

By the Act 54 Geo. III. c. 145, "To take away corruption of blood except in certain cases," attainder, whereby dignities were lost, is limited to high treason and murder, and the effects of the attainder do not extend beyond the offender's natural life, and do not prejudice the title. But in case of outlawry for treason or felony, the law of forfeiture still remains (33 & 34 Vict. c. 23).

There are several instances where peers have been degraded by Act of Parliament.

The doctrine of merger does not apply to dignities, so that if a baron is created an earl the dignity of a baron remains (2 *Inst.* 594).

As to the privileges of peers as members of the Upper House of Parliament, see HOUSE OF LORDS and PRECEDENCE.

While arrest on mesne process (*q.v.*) in civil cases continued, peers were exempt from it; but not from attachment (*q.v.*), nor from arrest in criminal cases.

They are entitled, if indicted for treason or felony, or for misprision of either offence, to be tried in the House of Lords or the Court of the Lord High Steward (*q.v.*). An indictment is found in the ordinary way by a Grand Jury, and is then removed by *certiorari* to the House of Peers.

The Act 4 & 5 Vict. c. 22 provides that every peer in Parliament, after conviction, shall be liable to punishment in the same way as other subjects.

Whether the privilege can be waived, and plea entered in any other Court, is doubtful.



In 1887 a case of *R. v. Lord Graves*, after plea and verdict of not guilty in the Queen's Bench, was brought before the House of Lords as a question of privilege (Hansard, vol. cccx. p. 246), and various opinions were expressed, the majority being that a peer could not so waive his privilege.

Peers are tried for misdemeanour in the ordinary way.

They take oaths in all legal proceedings as other subjects.

They are exempt from service on special and common juries (The Juries Act, 1870, 33 & 34 Vict. c. 77), though before that they were not compelled to serve.

Women may possess the dignity of peerage, and be peeresses either by creation, descent, or marriage.

They have all the rights and privileges of peers except so far as their sex may be a disqualification, *e.g.* the right of trial given by Statute (20 Hen. VI. c. 9), which declares that peeresses, either in their own right, or by marriage, shall be tried before the same judicature as other peers of the realm.

A peeress in her own right remains a peeress though she marry a commoner (1 *Inst.* 16 *b*).

If a woman who has acquired a dignity by marriage marries a commoner, she loses it, and all its rights and privileges; for that which is gained by marriage may be lost by marriage (Coke, 1 *Inst.* 16 *b*). If, however, a woman, noble by marriage, marries a noble of an inferior degree, she takes the dignity of the second husband (1 *Inst.* 19 *b*).

See PRECEDENCE.

[*Authority*, not quoted *supra*, Pike, *Constitution and History of the House of Lords*.]

**Pellage**—The custom or duty paid for skins of leather (Rot. Parl. 11 Hen. IV.).

**Penal Actions.**—A distinction is drawn by some authors between a penal action, which they define as an action for a statutory penalty, and a popular action (*actio popularis*) or *qui tam* action, which is brought by a common informer, who receives the whole or part of the penalty (3 Steph. Com.; 1 Chit. Gen. Pr. 25; 2 Chit. Archb.).

Whatever the correctness of this view in past times, the distinction is now obliterated, and penal action denotes a proceeding, civil in form, to recover a penalty imposed by statute by way of punishment, and not as compensation for a legal wrong (*Huntington v. Attrill*, [1893] App. Cas. 150).

The English Courts will not enforce the penal statutes of a foreign State (same case), but will use their own judgment, irrespective of foreign decisions, in determining whether a foreign law is or is not penal within the rule.

These proceedings were permitted by statute at a date when the position of misdemeanours in law was not fully established: when justices had no summary jurisdiction, and the police was inadequate to detect offences.

The policy of Parliament has for long been to treat acts and omissions which, in the fifteenth and sixteenth centuries, would be the subject of penal actions, as petty misdemeanours punishable on summary conviction, and to substitute informations before a Petty Sessional Court for the old procedure by action or by information by the Attorney-General; and the



Acts of 1575 (18 Eliz. c. 5; 31 Eliz. c. 5) and 1624 (21 Jas. I. c. 4) are repealed, so far as they relate to matters under penal statutes cognisable by a Court of summary jurisdiction.

The earliest reference to popular actions in a statute now in force is in 1488 (4 Hen. VII. c. 20). It is there recognised that the action depends on legislation passed to reform extortions, maintenances, oppressions, injuries, and wrongs affecting the public, which was liable to defeat by collusive or friendly proceedings.

The only present importance of the Act of Henry VII. is, that it avoids judgments in such actions obtained by collusion or covin without trial on the merits. In *Girdlestone v. Brighton Aquarium Co.*, 1878, 3 Ex. D. 137; 4 Ex. D. 107, the Courts came to the same conclusion without referring to the Act. In 1575 (18 Eliz. c. 5, s. 5) compounding a penal action without leave of the Court became, and still is, a misdemeanour triable at assizes or sessions, and punishable now by fine of £10 and by incapacity to sue (31 Eliz. c. 5, s. 1), and formerly also by pillory. The procedure for obtaining such leave, and the terms of its grant in the High Court, are regulated by R. S. C. 1883, Order 50, rr. 13-15. Under the Acts the venue was local, even where the plaintiff was a party aggrieved (*Lewis v. Davis*, 1875, L. R. 10 Ex. 86).

The provisions of the Acts of 1575 (18 Eliz. c. 5) and 1588 (31 Eliz. c. 5) and 1624 (21 Jas. I. c. 4) as to procedure, are now superseded, so far as relates to local venue in civil proceedings, by the Judicature Acts and Rules, and, so far as relates to pleading the general issue, by the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61).

The general rules with respect to penal actions, are—

(1) That unless a right of action is expressly given to the informer or person aggrieved, it is recoverable only at the suit of the Attorney-General.

(2) That unless the penalty is given wholly or in part to the informer or a person aggrieved, it goes, when recovered, to the Crown (*Clarke v. Bradlaugh*, 1883, 7 App. Cas. 354).

(3) That actions by informers, where permitted, are their own actions, and not Crown suits (*Sedgwick v. Richardson*, 1692, 1 Lut. 197); and appear not to abate by the death of the informer, at anyrate where the remedy is by action of debt.

(4) Corporations cannot sue as common informers unless expressly authorised by statute (see 52 & 53 Vict. c. 63, s. 2).

(5) The proceeding, though civil in form, is so far penal that discovery will not be given either of documents or by interrogatories (*Master v. Treacher*, 1886, 16 Q. B. D. 507; *Mexborough (Earl) v. Whitwood Urban District Council*, [1897] 2 Q. B. 111). The doctrine was clearly established as early as 1569 (see Col. *Inner Temple Documents*, vol. i. p. 51).

This rule applies even where the penalty is given to a person aggrieved (*Saunders v. Wiel*, No. 1, [1892] 2 Q. B. 321).

(6) Proceedings by information in the High Court on a penal statute, unless instituted *ex officio* by the Attorney-General, or authorised by a particular statute, can only be brought by the Master of the Crown Office by leave of the Court (4 Will. & Mary, c. 18, s. 1).

In deciding whether an action will lie for a statutory penalty, it is necessary to find express words or necessary implication to rebut the presumption that imposition of a penalty creates an offence punishable on indictment, and that even where the penalty is given to a particular person the procedure may still be criminal (see Hardcastle on *Statutes*, 2nd ed., 472-476).



Limitations of the time for proceeding by action under penal statutes were first imposed in 1509 (1 Hen. VIII. c. 24) and in 1516 (7 Hen. VIII. c. 3). These now in force are the Acts of 1588 (31 Eliz. c. 5, s. 5), which create a limitation of action to one year in the case of actions by persons suing *qui tam* or for themselves alone, or a limitation of time was imposed for proceedings on penal statutes—

(1) In 1509 (1 Hen. VIII. c. 24), of one year by informer and four years by the king.

(2) In 1516 (7 Hen. VIII. c. 3), of one year by common informers, of two years by *qui tam* informers, of four years by the king.

(3) In 1624 (21 Jas. I. c. 4), of one year by informers (*Dyer v. Best*, 1865, L. R. 1 Ex. 32). The limitations do not apply when the particular statute specifies a different time of limitation (31 Eliz. c. 5, s. 6; *Robinson v. Currey*, 1881, 6 Q. B. D. 21; 7 Q. B. D. 465). The Act of 1588 extends to subsequent statutes, but that of 1624 (21 Jas. I. c. 4), also containing limitations, does not extend to subsequent statutes (*Barber v. Tilton*, 1815, 3 M. & S. 429); and the latter Act (except sec. 4), being limited to proceedings by information *qui tam* or indictment, is now virtually inoperative (1 Wms. Saunders, 312 a).

Under 3 & 4 Will. IV. c. 42, s. 3, actions for penalties, damages, or sums of money given to the party grieved, under any statute not specifying another limitation, must be brought within two years from accrual of the cause of action (see *Robinson v. Todd*, 1881, 6 Q. B. D. 21; 2 Q. B. D. 465).

[*Authority*.—Chit. Stat. tit. "Penal Actions."]

**Penal Servitude.**—The common law remedy by imprisonment did not reduce the prisoner to a servile status, and was not at first applied to persons convicted of treason or felony. The method of compelling felons to abjure the realm has long been in disuse; and the penalty of banishment has always been statutory only (*Portland (Countess) v. Prodgers*, 1689, 2 Vern. 104; Hawk. P. C. bk. ii. c. 33, s. 137). Under an act of 1597 (39 Eliz. c. 4), Parliament authorised the banishment and transportation of incorrigible rogues; and on the colonisation of Virginia, transportation under indenture of bond-service was recognised, and, in imitation of Spain, felons under sentence of death were reprieved on condition of such transportation and service. The practice continued during the Commonwealth, and at the Restoration it became usual to grant pardons conditional on bond-service for a term in America (Kelyng, *Cr. Cas.* ed. Leveland, p. 4); and this course was recognised as legal by the Habeas Corpus Act, 1679 (31 Chas. I. c. 2, s. 13), as to felonies, but always depended on the assent of the offender. In 1717 (4 Geo. I. c. 11) transportation was made part of the sentence of the Court for sundry offences, and no longer depended on the will of the convict. It was used continuously till the successful revolt of the North American colonies, when for a time the African coast was selected, until, in 1788, the penal settlements in Australia were established. In 1776 (16 Geo. III. c. 43) the first experiment was made of putting convicts to labour in England, by quartering them in hulks and using them to dredge the Thames.

From 1717 the convicts under sentence of transportation were in chattel servitude to the Crown, with no power of owning or acquiring property. On the refusal of the Australian colonies to accept any more transported criminals, the system of penal servitude was in 1853



(16 & 17 Vic. c. 99) substituted for that of transportation, and the latter abolished in 1857 (20 & 21 Vict. c. 3). The history of the subject has been more fully traced in 6 *L. Q. R.* 388.

Penal servitude may be imposed in two ways:—

(1) By the sentence of the Court of trial. It may not exceed the maximum specified by the statute creating the offence or regulating its punishment, but may be for any term not less than three years (54 & 55 Vict. c. 69, s. 1). In Acts before 1853, "penal servitude" is read into them for transportation.

(2) By the Crown, as a condition of pardon of a person sentenced to death (16 & 17 Vict. c. 99, s. 5).

Passing of a sentence of penal servitude does not, since 1870, cause any forfeiture of the property of the convict, but deprives him of any office or employment under the Crown, or any public employment, benefice, or emolument under any corporation, including universities or colleges, and of any pension payable by the public or out of public money (33 & 34 Vict. c. 23, s. 2); and during the currency of his term he is deprived of all civil rights so far as concerns voting and the like, and the right to sue in any Court or to alienate any property (s. 8). His property may be vested in an administration appointed by a Secretary of State, or an interim curator appointed by justices, who may do all that is necessary to preserve it, and is accountable to the convict (ss. 9–29). The result of this is that during the currency of his sentence the convict is a slave of the State.

Sentence of penal servitude is now executed in convict prisons in the United Kingdom; but the convicts may still, if desired, be sent to British possessions abroad (16 & 17 Vict. c. 99, s. 6; and see *COLONIAL PRISONER*). The prisons, which have always been under the Crown, are established either under special Acts, or by royal warrant under sec. 10 of the Transportation Act, 1824, or sec. 6 of the Penal Servitude Act, 1853; and as to females, sec. 1 of 16 & 17 Vict. c. 121.

Those now in use in England are—

| PLACE.                                     | AUTHORITY.             |
|--------------------------------------------|------------------------|
| * Borstall, near Chatham (males) . . . . . | Warrant, 23 July 1885. |
| * Broadmoor (lunatics) . . . . .           | „ 19 Feb. 1862.        |
| * Chatham (males) . . . . .                | „ 1 Sep. 1852.         |
| * Dartmoor (males) . . . . .               | „ 26 Sep. 1853.        |
| * Dover (males) . . . . .                  | „ 23 July 1885.        |
| * Parkhurst (males) . . . . .              | „ 7 Apr. 1869.         |
| * Portland (males) . . . . .               | „ 26 Sep. 1853.        |
| * Portsmouth (males) . . . . .             | „ 20 Feb. 1852.        |
| * Aylesbury (males and females) . . . . .  | „ 3 Oct. 1890.         |

\* The warrants are collected in 5 *St. R. & O.*, Revised, p. 691; *St. R. & O.* 1890, p. 932.

These prisons are quite distinct from the ordinary local prisons, but can be appropriated as such if not wanted for penal servitude prisons (47 & 48 Vict. c. 51, s. 2 (3)).

The prisons are not under the Prison Commissioners, but under the directors of convict prisons, appointed under an Act of 1850 (13 & 14 Vict. c. 39). The powers of these directors depend on the Transportation Act of 1824, and their extent is somewhat obscure and doubtful. Legislation is before Parliament in the current session (1898) to simplify and systematise the law, and bring these prisons into line with the general law as to PRISONS.

Convicts may be transferred from one prison to another; and it is usual



to detain them in a local prison for some time before sending them to a convict prison (10 & 11 Vict. c. 67, s. 2; 16 & 17 Vict. c. 99, ss. 7, 8). While in prison they may be flogged by order of visiting justices for certain breaches of discipline (27 & 28 Vict. c. 47, s. 3). Their diet, discipline, and clothing are regulated by the directors.

The introduction of spirits, tobacco, and other articles into convict prisons is prohibited under penalties (11 Geo. IV. and 1 Will. IV. c. 39, s. 6; 13 & 14 Vict. c. 39, s. 4).

Persons under military law or naval discipline, who are sentenced to penal servitude by military or naval Courts, are detained in military or naval prisons. The prisons are appointed and regulated under rules and warrants contained in the Statutory Rules and Orders, Revised, vol. i. p. 42.

Persons sentenced to penal servitude may be released without pardon before the expiration of their sentence by a system of licences or tickets of leave (16 & 17 Vict. c. 99, s. 9). During the currency of the licence the convict is, subject to certain conditions, a free man, independent of any administrator and *curator bonis* as to his property acquired while at liberty (16 & 17 Vict. c. 99, s. 10; 33 & 34 Vict. c. 23, s. 30). If it is revoked, the convict may be arrested and sent to his original or another prison to complete his term (16 & 17 Vict. c. 99, s. 11; 20 & 21 Vict. c. 3, s. 5).

The conditions attached to the licence are those on Schedule A, Penal Servitude Act, 1864 (27 & 28 Vict. c. 47), as modified by the Penal Servitude Act, 1891 (54 & 55 Vict. c. 69, ss. 3, 5). Other forms may be used, but must be laid before Parliament (27 & 28 Vict. c. 47, s. 10; 54 & 55 Vict. c. 69, ss. 3, 5).

A licence-holder is not now required to report himself to the police (1864, c. 47, s. 4; 1871, c. 112, s. 21), but must give notice of his residence and of any change of residence (1864, c. 47, s. 4; 1871, c. 112, ss. 5, 8; 1891, c. 69, s. 4).

If he is convicted of any offence he forfeits the licence, and is remitted to prison to undergo not only his new sentence, but the unexpired residue of his original term (27 & 28 Vict. c. 47, s. 9; 54 & 55 Vict. c. 69, s. 3 (3); *R. v. King*, [1897] 1 Q. B. 214, 217). But a new licence may be granted in respect of the unexpired term after revocation of a prior licence (1891, c. 69, s. 3).

He may also forfeit his licence by refusing to produce it to officers of the law (1864, c. 47, s. 5); by earning his livelihood by dishonest means (1871, c. 112, s. 3); or by breach of any of the conditions of his licence, which, even if not amounting to an offence of itself, is punishable criminally (1867, c. 47, s. 5 (2); 1891, c. 112, s. 4).

**Penal Statute.**—A penal statute is one which imposes a pecuniary penalty or other punishment for an offence. The penalty is sometimes recoverable by the Crown, sometimes by the person aggrieved (see AGGRIEVED), and sometimes by a common informer (*i.e.* any person who chooses to sue for it). Where a statute imposed a liability in respect of false representations, and such liability was enforceable by action at the suit of the person injured, it was held that, the right of action being given to a subject for the purpose of enforcing in his own interest a liability imposed for the protection of his private rights, the statute was remedial, and not penal, so as to be within the rule of international law which prohibits the Courts of one country from executing the penal laws of



another country, or enforcing penalties in favour of the State (*Huntington v. Attrill*, [1893] App. Cas. 150).

It is a general rule of law that a penal statute ought to be construed strictly, and so as not to extend its provisions to any case which is not within both the spirit and letter of the enactment; and where general words follow an enumeration of particular cases, such general words only apply to cases *ejusdem generis* with those specified (*Fletcher v. Soudes*, 1826, 3 Bing. 501, 580; *Massey v. Morriss*, [1894] 2 Q. B. 412; *Roberts v. Woodward*, 1890, 25 Q. B. D. 412; *Chisholm v. Douulton*, 1889, 22 Q. B. D. 736; *Dyke v. Elliott*, 1872, L. R. 4 P. C. 184, 191).

The rule applies with a greater degree of force where the Act imposes a severe punishment, or affects the liberty of the subject, than where it merely imposes a pecuniary penalty (*Scott v. Morley*, 1887, 20 Q. B. D. 120; *Scott v. Pacquet*, 1867, L. R. 1 P. C. 552; *Bracy's case*, 1703, 1 Salk. 348; *Bond v. Evans*, 1888, 21 Q. B. D. 249; *Collman v. Mills*, [1897] 1 Q. B. 396; *Brown v. Foot*, 1892, 66 L. T. 649; *A.-G. v. Siddon*, 1830, 1 Crompt. & J. 220). In *R. v. Child* (1830, 4 Car. & P. 442) it was held that a rioter cannot be convicted of felony under the Riot Act if the words "God save the Queen" at the conclusion of the proclamation be omitted; in *Whiteley v. Chappell* (1868, L. R. 4 Q. B. 147), that a person could not be convicted under the Act of 14 & 15 Vict. c. 105, s. 3, "of personating a person entitled to vote at an election" if the person personated was dead at the time; and in *Scott v. Morley* (*supra*), that a married woman is not liable to be committed to prison under sec. 5 of the Debtors Act, 1869, for non-payment of a debt contracted by her during coverture. But a penal statute, like any other Act of Parliament, must be construed according to the intention of the Legislature; and if the words used are precise and unambiguous, they must be expounded in their natural and ordinary sense, and must not be narrowed contrary to the spirit of the Act (*Sussex Peerage case*, 1844, 11 Cl. & Fin. 143; *Fennell v. Ridler*, 1826, 5 Barn. & Cress. 406; *R. v. Edmundson*, 1859, 28 L. J. M. C. 213; *R. v. Hodnett*, 1786, 1 T. R. 96, 101; *Nicholson v. Fields*, 1862, 31 L. J. Ex. 233, 236). "The Court is not to find any doubt or ambiguity in the language of a penal statute, where such doubt or ambiguity would clearly not be found or made in the same language in any other instrument" (per James, L.J., in *Dyke v. Elliott*, 1872, L. R. 4 P. C. 184, 191). See also Maxwell's *Interpretation of Statutes*, pp. 367-399.

Complaints under penal statutes, where no time is specially limited, must be made within six months from the time when the matter of complaint arose (11 & 12 Vict. c. 43, s. 11). With regard to continuing offences, the effect of this provision is that penalties may only be imposed in respect of dates within the six months preceding the complaint (*R. v. Slade*, [1895] 2 Q. B. 247). See also PENALTY.

**Penalty.**—1. This term is ordinarily used for a pecuniary mulct exacted by a Court of justice for a criminal offence. It was originally quite distinct from a FINE, but is now generally used as its equivalent. The imposition of a penalty for an act or omission prohibited by statute is generally taken as the test whether the act or omission is criminal (see CRIMINAL CAUSE OR MATTER).

2. It is also used with reference to the penalties recovered by PENAL ACTIONS (*e.g.* by common approvers).

3. In contracts it has been usual to insert a provision providing for the payment of a sum by the party breaking it. It is usual to describe such a



sum as "liquidated damages, and not a penalty." But the Courts have in the past been astute to treat it as a penalty, and when it is so, will not permit recovery of more than the actual damage sustained (*Willson v. Love*, [1896] 1 Q. B. 626). This practice of the Courts originated from the provisions of 8 & 9 Will. III. c. 11, sec. 8 whereof, as to damages for breach of conditions in bonds, is still in force (*Davies v. Penton*, 1827, 6 Barn. & Cress. 216; 30 R. R. 298). The subject is fully dealt with in Hudson on *Building Contracts*, 2nd ed., 397, and Emden on *Building Contracts*, 3rd ed., 80.

**Penance** is said to be an ecclesiastical punishment used in the discipline of the Church which affects the body of the penitent, by which he is obliged to give a public satisfaction to the Church for the scandal he has given by his public example. In primitive times offenders had to give testimonies of their reformation, by doing public penance after open and public confession (see CONFESSIO AND ABSOLUTION), before they were readmitted to partake of the mysteries of the Church. Thus, until lately, in cases of incest or incontinency, a public penance by the offender—bare-legged and bareheaded, in a white sheet, making open confession of his offence in a set form of words in the church or the public market—was commonly enjoined on the offender; and in smaller faults and scandals, *e.g.* defamation, public satisfaction or penance was often ordered to be made before the minister, churchwardens, or some of the parishioners. As censures of penance might be moderated at the judge's discretion, according to the nature of the offence, so they might be altered by a commutation of penance; and it was the ancient privilege of the ecclesiastical judge to admit an oblation of a sum of money for pious uses in satisfaction of public penance.

There were three kinds of penance mentioned by the canonists: (1) private, enjoined by the priest at private confession; (2) public, enjoined by the priest for any notorious crime, either with or without the bishop's licence, according to the custom of the country; (3) solemn, enjoined by a bishop only, and continuing for two, three, or more years during Lent. Penances for notorious crimes could not be commuted under the old ecclesiastical constitutions. By the Statute *Circumspecte agatis* (13 Edw. I. 4) the bishops were allowed to hold pleas in Court Christian of things merely spiritual—to wit, of penances enjoined by prelates for deadly sin; and by the Statute *Articuli cleri* (9 Edw. II. 1, 2) the enjoining of penances pecuniary for offences was prohibited, while the enjoining of penances corporal was allowed, and the money for the redeeming thereof could be demanded before a spiritual judge. The commutation money was anciently applied to the use of the Church, and its disposal was regulated by canons in the time of Elizabeth. Under Anne, Convocation abolished all commutations, unless allowed in writing by the bishop of the diocese. Commutation money generally was given to the poor where the offence was committed, or applied to other pious uses at the discretion of the judge.

The doing of penance has been ordered up to quite recent times in cases of gross offences, such as incest, by ecclesiastical Courts (*Blackmore v. Brider*, 1816, 2 Phillim. 359, 362; *Chick v. Ramsdale*, 1835, 1 Curt. 34; *Courtail v. Humfrey*, 1828, 2 Hag. Ec. 1, penance ordered and insisted upon; *Burgess v. Burgess*, 1804, 1 Hag. Con. 393, penance ordered but dispensed with; *Randall v. Vowles*, 1856, Phillimore, *Eccl. Law*, ii. 1070, penance not ordered, but could have been). The ecclesiastical Courts still



retain this power to censure criminal conduct, such as in these cases; and orders of the ecclesiastical Courts to do penance have been enforced by process of *significavit* and writ *de excommunicato capiendo* (altered in 1813 to writ *de contumace capiendo*, i.e. for contempt) for the arrest and imprisonment of the offender (*R. v. Maby*, 1823, 3 Dow. & Ry. 570; *Kington v. Hack*, 1838, 7 Ad. & E. 708).

[*Authorities*.—Burn, *Eccl. Law*; Phillimore, *Eccl. Law*, 2nd ed.; Stephen, *Laws of Clergy*.]

**Penang.**—See STRAITS SETTLEMENTS.

**Pendente lite.**—See ALIMONY; LIS PENDENS.

**Pending.**—A pending action is an action which has been commenced, and in which some further proceeding may be taken (*Sherwood v. Ray*, 1837, 1 Moo. P. C. 353; *Hart v. Hart*, 1881, 18 Ch. D. 670, 680; *Fordham v. Clagett*, 1882, 20 Ch. D. 637, 653). So long as it is possible for any proceeding to be taken in a cause, such cause is still pending (per Jessel, M. R., in *Fordham v. Clagett*, *supra*, p. 653). Thus, for the purposes of sec. 24 (5) and (7) of the Judicature Act, 1873, an action is pending after final judgment so long as the judgment remains unsatisfied (*Salt v. Cooper*, 1880, 16 Ch. D. 544. See also *Howell v. Bowers*, 1835, 2 C. M. & R. 621; *Redfield v. Wickham*, 1888, 13 App. Cas. 467). But after foreclosure absolute the action is at an end, and a receiver cannot be appointed, nor any other proceeding be taken (*Wills v. Luff*, 1888, 38 Ch. D. 200).

In sec. 19 of the Patents, Designs, and Trade Marks Act, 1883 (46 & 47 Vict. c. 57), the words "pending action" mean a pending action before judgment (*Cropper v. Smith*, 1884, 28 Ch. D. 148).

**Penny Postage.**—See POST OFFICE.

**Pension.**—This term is used in two senses—(1) Payments by members of a society in respect of dues. In this sense it is still used in Cambridge University, and it often appears in the records of the Inner Temple (see INNS OF COURT). (2) It is also, and more generally, applied to annual payments made to persons superannuated from the service of the Crown or the Church, or some other public body. At one time it was the practice of the Crown to grant freely perpetual or other pensions, charged on the permanent hereditary revenues of the Crown or the civil list; but at present no grant of a pension chargeable on public funds can be made without the authority of Parliament, and proceedings have been taken to commute and extinguish most of the perpetual pensions previously granted. The Acts in force granting such pensions to members of the royal family, or for distinguished public service, are enumerated in the official index to the statutes under the title "Annuity."

The influence obtained by the Crown in Parliament by grant of pensions led to legislation disqualifying pensioners from holding seats in the House of Commons.

In 1707 (6 Anne, c. 41, s. 24) all persons holding pensions from the



Crown during pleasure were so disqualified; and in 1716 the disqualification was extended to pensions held for years (1 Geo. I. st. 2, c. 56). In 1782 (22 Geo. III. c. 82, s. 30) grants of royal bounty more than once in three years to the same person were treated as pensions. Subsequent legislation has created exceptions from the disqualification in the case of recipients of pensions in the civil or diplomatic service (32 & 33 Vict. c. 13; 32 & 33 Vict. c. 43, s. 17).

The grant of pensions to Crown officials is now completely regulated by statute, of which a summary only can be given within the limits of this article.

*Civil List.*—In 1832 (3 & 4 Will. IV. c. 86) certain ancient pensions and similar allowances, formerly charged on the civil list, were charged on the land revenues of the Crown, to the extent of £6157 per annum.

On the accession of the Queen, provision was made for the grant of pensions out of the civil list by setting apart £1200 a year for that purpose (1 & 2 Vict. c. 5, s. 9), and it was provided that such pensions should be granted only to persons who have just claims on the royal beneficence, or who, by their personal services to the Crown, by the performance of duties to the public, or by useful discoveries in science and attainments in literature and the arts, have merited the consideration of the sovereign and the gratitude of the country. A list of such pensions granted in any year must be laid before Parliament within thirty days of June 20 (s. 6); and, by a later Act (c. 95, ss. 1, 2) of the same year, the Queen is authorised to charge £136,000 a year on the Consolidated Fund in payment of certain pensions charged on the civil list by 2 & 3 Will. IV. c. 116.

*Political Services.*—The Political Offices Pension Act, 1869 (32 & 33 Vict. c. 60), provides for the grant of pensions to certain persons who have held offices in the civil service, usually held by members of the House of Lords or the House of Commons; but does not apply to offices in the permanent civil service, nor to the chancellor or law officers, but does apply to the judge advocate-general (s. 1).

Pensions granted under the Act are payable out of the Consolidated Fund, except in the case of offices the salary of which is paid out of Indian revenues; in which case the pension falls on that revenue (ss. 5, 8). The pensions are payable on the following scale:—

| OFFICES.                                                             | SCALE.                                                                           |
|----------------------------------------------------------------------|----------------------------------------------------------------------------------|
| First Lord of Admiralty or offices of salary not under £5000 a year. | Not exceeding £2000 a year, in respect of a service of not less than four years. |
| Offices at a salary less than £5000, and not under £2500.            | Not exceeding £1200, in respect of a service of not less than six years.         |
| Offices at a salary less than £2000, and over £1000.                 | Not exceeding £800, in respect of a service not under ten years.                 |

The service need not be continuous, and provision is made for counting up service in lower classes as a qualification for pensions in a higher class.

When an applicant for a pension receives any salary or pension paid out of public revenue, he must so inform the Treasury, and must surrender the prior salary or pension if it exceeds the political pension, or deduct its amount if it does not exceed it. He must also file a declaration, stating the grounds on which the pension is claimed, and that his income from other sources is so limited as to bring him within the Act (1834, c. 24, s. 6; 1869, c. 60, s. 7).

*Diplomatic Service.*—The pensions of persons in the diplomatic service are regulated under 32 & 33 Vict. c. 43, which applies to diplomatic offices only, and not to ordinary consuls with commercial functions only.



*Colonial Service.*—The pensions of colonial governors are regulated by Acts of 1865 (28 & 29 Vict. c. 113) and 1872 (35 & 36 Vict. c. 29), in accordance with scales scheduled to the latter Act, and subject to provisions of 1889 (50 & 51 Vict. c. 13), for determining how far the service of the pensioner is imperial civil service or colonial service only; and colonial governors fall to some extent within the provisions of the Acts relating to Permanent Home Civil Service (below), but they cannot get concurrent pensions as governors and as permanent civil servants.

*Civil Service.*—The pensions and superannuation allowances in the permanent civil service are mainly regulated by the Superannuation Acts of 1834 (4 & 5 Will. IV. c. 24) and 1859 (22 Vict. c. 26). The persons entitled to these pensions are—

- (1) Persons holding office directly from the Crown.
- (2) Persons admitted to the service on certificate from the Civil Service Commissioners (1859, c. 26, s. 17; 1887, c. 57, s. 2).
- (3) Persons serving jointly in the India Office and the Home Civil Service (1860, c. 89).
- (4) Workmen in the manufacturing and store departments of the War Office, who entered the service between 17th December 1861 and 4th June 1870 (1890, c. 18).
- (5) Persons employed in any imperial civil capacity in a colony, and also in the Permanent Colonial Civil Service, in proportion to the extent of their imperial service (1887, c. 13).

The scales of allowance are regulated by the Acts of 1834 and 1859, subject to a power to add on years to service to count for pension in case of professional and other special offices, and to give special rates for services in unhealthy places.

No pension is payable on retirement under sixty, except on a medical certificate of permanent infirmity or incapacity of mind or body (1859, c. 26, ss. 10, 11), and after independent inquiry by the Treasury under a minute of 10th December 1892. The pension may be increased for special merit, or cut down for demerit (1859, c. 26, s. 9).

The Acts and rules on this subject are collected in Highmore's *Inland Revenue Regulation Acts*, 1896.

Persons who are in receipt of non-effective pay, if they are put into a civil office of profit under any public department, or under a colonial or foreign Government, are subject to rules made by the Treasury in 1887, framed to secure a reduction of the non-effective pay while the new employment continues. The rules do not extend to pensions for wounds or rewards for distinguished or meritorious service (see Highmore, p. 173).

Pensions may be commuted wholly or in part under Acts of 1871 (34 & 35 Vict. 36) and 1882 (45 & 46 Vict. c. 44), when granted (1) to officers in the army or navy, (2) when granted to civil servants on abolition or reorganisation of their offices. The Treasury minutes under these Acts are printed in Highmore.

The pensions granted by the Crown are subject to income tax, but to no other tax (1859, c. 22, s. 16).

*Naval and Military Service.*—See GREENWICH HOSPITAL; PAY AND PENSIONS, MILITARY AND NAVAL.

*Judicial Service.*—As to the pensions of judges, see SUPREME COURT. The Masters and subordinate officials of that Court for purposes of pension are civil servants. As to County Court judges and officers, see COUNTY COURTS.

London police magistrates may obtain pensions (see METROPOLITAN POLICE DISTRICT).



*Municipal Service.*—Statutory provision is made for pensions to the police, paid partly out of imperial taxation (see POLICE).

Pensions are granted to poor law officers under the Poor Law Officers Superannuation Acts of 1896 and 1897, and may be granted by certain authorities in London under the Superannuation Metropolis Act, 1866 (29 Vict. c. 31; see Hunt, *London Government*, vol. ii. p. 1236). There is not at present any general statutory provision for pensions to officers of local authorities; but a Bill is now (sess. 1898) before Parliament on the subject.

*Ecclesiastical Pensions.*—Bishops, deans, canons, or incumbents may be pensioned if incapacitated by age or infirmity from the discharge of their ecclesiastical duties. The pension is paid from the revenues of the See, office, or cure vacated.

Whether a pension is alienable or not depends on the particular Acts and regulations under which it is granted; but a pension, even if inalienable, vests in the trustee in bankruptcy (*Ex parte Huggins*, 1883, 21 Ch. D. 85), and may be dealt with under sec. 53 of the Bankruptcy Act, 1883 (*In re Saunders*, [1895] 2 Q. B. 424).

When not alienable, they cannot be taken in execution (*Lucas v. Harris*, 1886, 18 Q. B. D. 127), unless commuted (*Crowe v. Price*, 1888, 22 Q. B. D. 429). It is immaterial whether the execution is legal or equitable.

**Pensioner.**—See GREENWICH HOSPITAL; PENSION; PAY AND PENSIONS, MILITARY AND NAVAL.

**Pension (of Churches).**—Pensions are certain sums of money paid to clergymen in lieu of tithes; and some churches have settled on them annuities or pensions payable by other churches. These pensions are due by virtue of some decree made by an ecclesiastical judge upon a controversy for tithes, by which the tithes have been decreed to be enjoyed by one, and a pension thereof to be paid to another; or they have arisen by virtue of a deed made by the consent of the parson, patron, and ordinary.

By the Statute 26 Hen. VIII. c. 3, s. 18, it is provided that they who pay pensions to others out of their spiritual living may retain the tenth part thereof. By sec. 19 no pension shall be reserved upon the resignation of a benefice, above the value of the third part. A bishop may sue for a pension before his chancellor, and an archdeacon before his official.

By 13 Eliz. c. 20, s. 1, the grant of any new pension is made void. Pensions may, however, be granted to bishops resigning under the Bishops Resignation Act, 1869 (32 & 33 Vict. c. 111), to deans and canons resigning under 35 & 36 Vict. c. 8, and to incumbents resigning according to the provisions of the Incumbents Resignation Acts (34 & 35 Vict. c. 44, and 50 & 51 Vict. c. 23).

See Phillimore's *Eccles. Law*, 2nd ed., pp. 1238–41.

**Pensions of the Inns of Court.**—See BAR, vol. ii. at p. 7.

**Pentecostals**—Pious oblations made at the feast of Pentecost or Whitsuntide by parishioners to their priest, and sometimes by inferior churches or parishes to the principal mother-church. These oblations were



also called Whitsun-farthings, and were divided into four parts: one to the parish priest, a second to the poor, a third for repair of the church, and a fourth to the bishop. See Bennet's Glossary in *Pentecostalia*.

**Pentonville.**—Pentonville Penitentiary was a prison in the Clerkenwell district of London used as a place of confinement for male convicts under sentence of penal servitude. The Housing of the Working Classes Act, 1885 (48 & 49 Vict. c. 72), however, by sec. 3 empowered the Crown authorities, in the event of its being found convenient to remove it, to convey the site to the Metropolitan Board of Works at a fair market price, and it has since been demolished, part of the site being now occupied by the parcels department of the General Post Office. It used to be under the supervision of the Directors of Convict Prisons, by whom its governor, chaplain, and other officials were appointed. The chief Acts regulating it were the 5 & 6 Vict. (1842) c. 29; 13 & 14 Vict. (1850) c. 39; 16 & 17 Vict. (1853) c. 99, s. 6; and 20 & 21 Vict. (1859) c. 3, s. 3.

**Peoples.**—See RULERS, PRINCES, AND PEOPLES.

**Pepper-corn**—A nominal rent, as its name implies, reserved where the land is to be held practically rent free, yet the landlord wishes, if necessary, by demanding the pepper-corn to have the tenancy at any time acknowledged by the tenant. The *reddendum* in the lease for a year that preceded the release generally reserved a pepper-corn as rent. In modern times building leases sometimes reserve a pepper-corn as rent for the first few years.

The production of a receipt for a pepper-corn does not relieve a vendor of a lease from proving that covenants in the lease have been complied with; sec. 3, subsec. 4 of the Conveyancing Act, 1881, does not apply to such a rent (*In re Moody v. Yates' Contract*, 1885, 30 Ch. D. 344; a case of a building lease).

**Perambulation.**—The main object of perambulation is to prevent encroachment on the lands travelled through by persons not entitled, and the acquisition by such of prescriptive rights thereover. Thus in Rogation week of each year the minister, churchwardens, and parishioners were supposed to go round their parishes; and it was held that they were justified, in the course of so going round, to cross any man's land according to usage, and even abate nuisances (*Goodday v. Michell*, 1594, Cro. (1), 441). Manors may also be perambulated. So a writ *perambulatione faciendâ* is available where two lordships lie near each other, and encroachments are alleged to have been made. This writ directs the sheriff to make due perambulation, and set down the certain limits of the respective lordships, so that the true bounds thereof may be severally known. A lord of the manor may even establish by perambulation rights against the Crown as to the seashore, which is in the Crown by common right.

**Per and Post.**—To claim *per* is to claim through the person last entitled to the estate claimed; this being the usual claim, viz. by devolu-



tion or assignment. The technical expression is "to come in in the *per*." On the other hand, to "come in in the *post*" is to claim by an overriding and prior title to that of the person last entitled to the estate, *e.g.* in the case of escheat.

In the case of the old writ of entry, the Statute of Marlbridge (52 Hen. III. c. 30) gave the disseisee or his heir a writ of entry "*sur disseisin in the post*," that is to say, he might allege that his adversary had no right of entry in the land save after (*post*) the disseisin that some person or other had perpetrated against the demandant; and it was unnecessary for the demandant to trace the degrees by which the land passed from the person who had originally disseised to the party in possession, against whom the writ was brought. Previously thereto the writ could only be brought against the original intruder or his descendant or feoffee, but no further. This "degree" of descent was called the *per*, and the writ alleged "*non habuit ingressum nisi per X.*" (the original disseisor).

"The first stage is 'into which he had no entry save by (*per*) X., who demised it to him, and who had disseised the demandant or his ancestor.' The second stage is 'into which, etc., save by (*per*) X., to whom (*cui*) Y. demised it, who had disseised, etc.' The first form is a writ in the *per*; the second, in the *per* and *cui*" (Pollock and Maitland's *History of English Law*, ii. 65). The writ in the *post* was meant to extend to cases of more than two degrees (*i.e.* where there had been more than two alienations or descents), beyond which no writ of entry lay at common law; and subsequently to its introduction by the statute, the writ in such cases was "*non habuit ingressum nisi post intrusionem quam fecit*"; the third stage, therefore, being "into which he had no entry save after (*post*) X., who had disseised, etc." See Pollock and Maitland, *History of English Law*, *loc. cit.*

**Per capita; Per stirpes.**—Where distribution is to be *per capita*, the members of the class take the property to be distributed in equal shares, the individual alone being considered in the distribution. In distribution *per stirpes*, the stock or family is considered, and children do not take concurrently with their parents where the class consists of descendants.

The question arises frequently, in construing gifts to children in wills, whether the fund given is to be distributed *per capita* or *per stirpes*.

In default of an intention expressed in or inferred from the will, the following gifts are to be treated as distributable *per capita*:—

(i.) Gifts to children of several parents, *e.g.* gift to children of A. and B.; children of A. and children of B.; children of A., children of B. and C.

(ii.) Gifts to parents and their issue; or to a class and their children. See the cases collected in Theobald on *Wills*, 251; Jarman on *Wills*, ii. 1050 *et seq.*

But slight indication of intention is sufficient to import a distribution *per stirpes*. Such an intention has been held indicated in the following instances:—

(1) The fact that the annual income of the fund is, pending distribution, to be applied to the legatees *per stirpes*.

(2) A gift over to other legatees *per stirpes*.

(3) Where the gift to children is substitutional, *e.g.* to A., B., and C., or their children, the children take *per stirpes*.

(4) Directions importing a distribution *per stirpes*, *e.g.* a direction that such "issue shall take their respective parents' shares, excludes the idea of



the issue competing with the original takers under the gift." So likewise the use of the word *parent* where it is provided that the issue shall take the parent's share, is held to mean the parent of each successive generation, and the word is said to be used in "a recurring or sliding scale."

The same questions of construction arise when there is a gift to several for life, and then to their children. Where the life tenants are tenants in common, "after the death" means, naturally and primarily, after the death of each, and consequently "to their children" means "to their respective children," and the children take *per stirpes* (cp. *In re Hutchinson*, 1882, 21 Ch. D. 811).

But where the gift after the death of the tenants for life is to the children of some only of the tenants for life, they take *per capita*; and where it is clear that the distribution is not to take place till the death of the last surviving tenant for life, the children likewise take *per capita* (see Theobald and Jarman, *loc. cit.*).

As to (1) above, it should be noticed that although the fact that the annual income, pending distribution, is applied *per stirpes* may point to an indication of intention that the corpus, when distributable, shall be distributed *per stirpes*, if the ultimate words are clearly in favour of a distribution *per capita* the Court will not decide for a division *per stirpes*. And where a testator gave real and personal estate to his wife for her life, and directed that after her death the income should be divided between his brothers and sisters therein named, "at the decease of either my before-named brothers or sisters, their interest to be equally divided amongst their children, and after the decease of all I desire the whole of my property to be called in and to be equally divided between the children of the aforesaid, share and share alike," it was held by the Court of Appeal that the ultimate gift to the nephews and nieces was a clear gift *per capita*, and could not be controlled by the fact that so long as any brother or sister of the testator was living the income was divisible *per stirpes* (*In re Stone, Baker v. Stone*, [1895] 2 Ch. 196, reversing the decision of the Court below, following *Brett v. Horton*, 4 Beav. 239, and the older cases).

**Percaptura**—A place in a river made up with banks, etc., for the better preserving and taking of fish (*Paroch. Antiq.* 120).

**Percentage**.—The number one hundred has been found in practice for many purposes a useful standard upon which to calculate rates of interest and other similar payments. For instance, the stamp duty on bills of exchange and money drafts is, for sums of £100 and upwards, one shilling per hundred pounds or fraction thereof. So under the Agricultural Holdings Act, 1883, 46 & 47 Vict. c. 61, Sched. 2, the person making a distress for rent under the Act, that is to say, the bailiff, and not the landlord (*Philipps v. Rees*, 1889, 24 Q. B. D. 17, overruling *Coode v. Johns*, 1886, 17 Q. B. D. 714), is entitled to a "percentage." So also the schedule to the order as to Supreme Court Fees, 1884, item 72, gives a percentage by way of Court fees. Under this order it was held that the Court fees on a trustee's periodical accounts should be proportionate to the amounts found from time to time to have been received, and not to the amounts due (*In re Crawshay, Dennis v. Crawshay*, 1888, 39 Ch. D. 552); and under the Rules of Court, 1875 (Court Fees), it was also held that the percentage for Court fees was payable on the gross receipts in accounts



ordered to be taken (*Armitage v. Elworthy*, 1879, 13 Ch. D. 91). As to the percentage chargeable by solicitors on purchase-money under the Solicitors Remuneration Act, 1881, 44 & 45 Vict. c. 44, see *In re Lacey & Son*, 1883, 25 Ch. D. 301. Where a manager of ironworks verbally agreed to be remunerated by seven and a half per cent. of the profits on condition that the percentage paid in any year should never be less than £500, and for several years received £500, though entitled to more, it was nevertheless held that, in the absence of fraud, he could only recover the overbalances without interest (*Rishton v. Grissell*, 1870, L. R. 10 Eq. 393).

**Per Cwt.**—In contracts this phrase will receive its ordinary and natural signification. Sometimes it may be implied though not expressed. Thus in one case parol evidence was admitted to show that in the hop trade a contract for the sale of a stated number of pockets of hops at so many shillings referred to the price “per hundredweight” (*Spicer v. Cooper*, 1841, 10 L. J. Q. B. 241).

**Peremptory.**—Any statement or declaration is peremptory (from Latin *perimo*, I cut off) which is meant to be final and determinate, and is therefore couched in absolute or positive language. There is no hope of further amendment or indulgence. Eight classes of peremptory matters will be noted here, namely: (1) challenge; (2) day; (3) mandamus: order; (4) paper; (5) plea; (6) rule; (7) undertaking; and (8) writ.

1. *Peremptory Challenge.*—See JURY.

2. *Peremptory Day.*—By the rules of Court a precise time is in many cases fixed for papers to be lodged or business to be done. Thus if a statement of claim is not delivered in time, a defendant may apply to dismiss the action for want of prosecution (R. S. C. Order 27, r. 1). And every judgment or order to do any act must state the time within which it is to be done, and have endorsed on it a memorandum of the penalty for disobedience to it (Order 41, r. 5). At the same time, the Court can always make orders enlarging a time fixed for the doing of an act, when the question is one of procedure (*Carter v. Stubbs*, 1880, 6 Q. B. D. 116; *Pilcher v. Hinds*, 1879, 11 Ch. D. 905), though not apparently when the time is fixed by statute (*In re Oliver & Scott's Arbitration*, 1889, 43 Ch. D. 310; *Flower v. Bright*, 1862, 2 John. & H. 590; and cp. Order 37, r. 12). See TIME, *Extension of*.

3. *Peremptory Mandamus: Order.*—See MANDAMUS: ORDERS.

4. *Peremptory Paper.*—The rules of Court provide for the publication of papers containing lists of the causes to be tried, which in the Chancery Division is one of the duties of the registrars (R. S. C. Order 62, r. 17). On the peremptory paper are placed such motions and other matters as are to be disposed of before any other business. At the hearing, motions may be adjourned on such terms as the Court or judge thinks fit (Order 52, r. 7); and should notice thereof be withdrawn, or the parties moving not appear, the respondent will be entitled to his costs (*Ballard v. Halliwell*, 1896, 65 L. J. Q. B. 332; *Harrison v. Leutner*, 1881, 16 Ch. D. 559; *Berry v. Exchange Trading Co.*, 1875, 1 Q. B. D. 77).



5. *Peremptory Plea*.—Pleas or defences to actions were formerly divided into dilatory pleas and peremptory pleas; the former being those which did not affect the cause of action itself, but merely stopped the particular action, while the latter defeated the plaintiff's claim altogether, wherefore they were styled pleas in bar or peremptory pleas. See BAR, PLEA IN.

6. *Peremptory Rule*.—In practice, previously to the Common Law Procedure Act, 1852, a defendant might obtain a peremptory rule to declare within a certain time, that is, a rule made absolute in the first instance. The Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76, s. 53), abolished this practice and substituted a four-day notice, requiring the opposite party to declare, or, in default, have judgment *non pros.* entered against him. Now, under the Judicature Act, 1873 (36 & 37 Vict. c. 66, s. 100), the word "order" shall include rule (cp. *Walsall Overseers v. L. & N.-W. Rwy. Co.*, 1878, L. R. 4 App. Cas. 30); and in default of delivery of a statement of claim, the defendant may apply to have the action dismissed for want of prosecution, though, on the hearing of such application, the judge will usually give directions in the form of a peremptory order to plead within a time fixed, or, in default, have the action dismissed without further notice (Order 27, r. 1; Seton, pp. 119, 120; and see *supra*, *Peremptory Day*). Such an order is interlocutory and not "final"—at all events, within the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 4, subs. 1 (*In re Riddell, Ex parte Strathmore*, 1888, 20 Q. B. D. 513; approved in *Salaman v. Warner*, [1891] 1 Q. B. 734); and may therefore be appealed against by a four days' notice (Order 58, r. 3). See NON PROS.

7. *Peremptory Undertaking*.—The Court might formerly, and can now in some cases, set aside a judgment for want of prosecution upon payment of costs, and a peremptory undertaking to try at the next sittings or assizes, especially if the plaintiff had been delayed on account of his witnesses or the like (cp. R. S. C. Order 27, r. 15). Generally speaking, however, a formal order will be drawn up (*In re Hull and County Bank*, 1879, 13 Ch. D. 261), disobedience to which, except it be for the payment of money, will be enforced by attachment or by committal (Order 42, r. 7). When an undertaking is given to the Court it is equivalent to an injunction, and its breach may be punished in the same way (*Neath Canal Co. v. Ynisarwed Colliery Co.*, 1875, L. R. 10 Ch. 450; *London and Birmingham Rwy. Co. v. Grand Junction Canal*, 1835, 1 Rwy. Ca. 224). So an undertaking to pull down buildings may be enforced (*Smith v. Day*, 1882, 21 Ch. D. 421), as also one not to appeal (*King v. Ashwin*, 1884, 28 Sol. J. 376; *Jones v. Victoria Graving Dock Co.*, 1877, 2 Q. B. D. 314); and if a plaintiff obtains an injunction by an undertaking to amend his writ, and he fails to do so, the injunction may be dissolved (*Spanish Agency Corporation v. Spanish Corporation*, 1890, 63 L. T. 161).

8. *Peremptory Writ*.—This was a form of original writ occasionally in use when nothing was specifically demanded, but only a satisfaction in general. For instance, a writ of this form might be issued to a sheriff, directing him to cause the defendant to appear in Court without any option given him, provided the plaintiff gave the sheriff security effectually to prosecute the claim. Such a writ was called from its words a *si te fecerit securum*. Among peremptory writs were writs of trespass on the case, wherein no debt or other specific thing was claimed, but only damages to be assessed by a jury.



**Performance.**—The equitable doctrine of performance is the best illustration of the maxim, “equity presumes an intention to fulfil an obligation.” It is with “performance” in this sense only that this article deals.

Where a person covenants to do an act, and subsequently does that which may rightly be considered a performance or partial performance of the covenant, equity treats it as such, and discharges the covenantor and his estate *pro tanto* from his obligation. In performance, equity presumes the doing of the very thing in respect of which the obligation exists; in the case of “satisfaction,” the thing done is something different, yet none the less in substitution for that in respect of which the obligation exists. See MAXIMS OF EQUITY; SATISFACTION.

The leading cases on the doctrine of performance are *Lechmere v. Lechmere*, 1735, Ca. t. Talb. (performance of a covenant to purchase and settle land), and *Blandy v. Widmore*, 1716, 1 P. Wms. 323; 2 Vern. 709 (performance of a covenant to leave money). And it is from these two cases that the chief principles that govern the doctrine may be deduced. See the cases in White and Tudor’s *Leading Cases in Equity*, vol. ii., 7th ed., pp. 399 and 407 respectively, and notes thereto.

The application of the doctrine is not necessarily excluded by the fact that there are some differences in the respective ways in which the act in question is covenanted to be done and that in which it is “performed.” And of this principle the leading case of *Lechmere v. Lechmere* affords a good illustration. There the covenantor on his marriage covenanted to lay out £30,000 within one year after his marriage in the purchase of freehold lands in fee-simple in possession, with the consent of the trustees, the lands when purchased to be settled on himself for life, and after his death upon certain trusts, with an ultimate remainder to himself, his heirs and assigns for ever. At his death the covenantor was possessed of realty which, for convenience, may be thus classified: (1) lands of which he was seised before his marriage; (2) estates for lives and reversionary interests purchased after his marriage; (3) freehold lands in fee-simple in possession purchased after his marriage, but not purchased within a year, or with the consent of the trustees. It was held that the money which the covenantor had agreed to lay out in lands ought to be taken as land, and go to the heir; and the question thereupon arose as to whether the lands that descended to the heir were to be considered as a performance of the covenant. It was clear that the first class above noticed could not have been so intended, nor could the second, the property in question being of a totally different nature from that of the property in the covenant. The third class, however, in spite of the inconsistency as to the time limit of one year, and the consent of the trustees, was held to have been purchased with the intention of performing the covenant, and the descent of such lands to the heir was held to be a performance of the covenant. The fact that the value of the lands thus descending was very far short of £30,000 did not exclude the application of the doctrine, Lord Talbot stating the principle thus: “It is not an objection to say they are of unequal value; for a covenant may be executed in part, though it is not so in satisfaction.”

Permission merely as well as actual commission may result in performance, *e.g.* a covenant to settle on an eldest son an estate of the annual value of £100 is performed by the death intestate of the covenantor, and the devolution on the son (as heir) of an estate of that value (*Wilcox v. Wilcox*, 1706, 2 Vern.).

*Covenants to Purchase and Settle Land.*—From the above cases, as



regards the doctrine of performance as it affects covenants to purchase and settle lands, the following points may be deduced:—

1. A difference in the *time* at which the title to the lands is acquired is material, and will exclude the application of the doctrine, for if a man covenants to purchase in the future it is not reasonable to presume that he intends to bind property of which he is possessed at the time of covenanting.

2. A difference in the nature of the property purchased is likewise material, and excludes the doctrine. Accordingly the more general the description of the property in the covenant the greater the likelihood of purchased property being held to have been purchased in performance of the covenant, *e.g.*, though, as in the leading case, a purchase of estates for lives and reversions cannot reasonably be held to have been made in performance of a covenant to purchase freeholds in possession in fee-simple, nor again a purchase of leaseholds or copyholds in performance of a covenant to purchase “freeholds,” yet where the covenant is to purchase “lands” simply, a purchase of copyholds has been held to be a performance. The question in each case is what is the intention of the purchasing covenantor to be reasonably presumed (*cp. Pennell v. Halle*, 1751, Amb. 106).

3. A difference as to the exact method in which the property is purchased (*e.g.* without the trustee’s consent) is immaterial, for when the covenantor makes the purchase, it is but reasonable to presume that he does so, not voluntarily, but in discharge of his obligation (*Lechmere v. Carlisle*, 1735, Ca. t. Talb. 80; *Lechmere v. Lechmere*, *supra*). And *Sowden v. Sowden*, 1785, 1 Bro. C. C. 582; 1 Cox, 165, is an even stronger instance: the husband on marriage covenanted to pay the trustees not less than £2000, to be laid out by them in lands in a certain county, and subsequently never paid the money to the trustees, but soon after the marriage purchased lands in that county, and took a conveyance of them to himself in fee. He then died without making any settlement, and intestate, and it was held that the lands were to be deemed purchased in performance of the covenant, and to be liable to the trusts of the settlement. “If a man covenants to purchase land *modo et forma*, and if he do purchase at all, whether *modo et forma* or otherwise, it shall be the same thing.”

4. A difference in the respective values of the lands is immaterial, the purchase in such a case being a performance *pro tanto* of the covenant.

5. The money need not be laid out altogether upon one purchase; purchases made from time to time will satisfy, and therefore be a performance of, the covenant.

A covenant to purchase lands, as a consequence of the doctrine of performance, binds in equity the lands which are deemed to have been bought in performance of the covenant even in the hands of the heir, since “a man can be no contractor with his heir or executor, for they all derive under his will or permission.” But the covenant does not create any lien or charge on the covenantor’s property so as to affect a purchaser or mortgagee, “who is a purchaser *pro tanto*.” For if the covenantor sells the lands, this is a sufficient evidence of his intention that he did not mean to act in pursuance of his covenant (per Lord Hardwicke in *Deacon v. Smith*, 1746, 3 Atk. 323; *Mornington v. Keane*, 1858, 2 De G. & J. 292, and see cases there cited).

*Covenants to leave Money.*—By analogy to the doctrine above noticed on covenants to purchase and settle land, and more especially by analogy to the decision in *Wilcox v. Wilcox*, it was decided in *Blandy v. Widmore* (*loc. cit.*) that a covenant to leave a sum of money is performed by the



covenantor dying intestate, and allowing thereby an equal sum to devolve on the intended donee (*Thacker v. Key*, 1869, L. R. 8 Eq. 408). In the leading case the covenantor covenanted to leave his intended wife £620, and that his executors should pay her that sum within three months after his death; he died intestate and without issue, and his wife thereupon becoming entitled to half of his estate under the Statute of Distributions, it was held that her distributive share far in excess of the £620 was a performance of the covenant. And if the distributive share is less than the sum in the covenant it is a part performance (*Gartshore v. Charlie*, 1804, 10 Ves. 1; 7 R. R. 311). A covenant that the executors of the covenantor shall pay is the same as a covenant to "leave." And it is immaterial whether the subsequent benefit accrues by actual or virtual intestacy, *e.g.* failure of a bequest or bequests. Accordingly, where a husband covenants to leave his wife £3000, and by his will gives his property to certain executors on trust to divide it as they shall think right, and all the executors predecease him or renounce, and the property is accordingly divisible under the Statute of Distributions, the wife's share is likewise a performance of the covenant (*cp. Goldsmid v. Goldsmid*, 1818, 1 Swans. 211). But to the application of this rule there are certain exceptions; the exceptions are, however, clearly distinguishable from the rule. The true rule is stated in *Gartshore v. Charlie*, 1804, 10 Ves. 1; 7 R. R. 311, viz. a covenant by a husband to leave or pay at his death, or that his executors shall pay at his death to a person who, independently of that engagement by the relationship between them will take a provision, is to be construed with reference to that, and the slight difference between leaving and paying, or whether within three or six months, or the executor's year, is not attended to. Clearly in such cases as this the party recovers by the intestacy all that could have been recovered by an action on the covenant. There is no breach of the covenant, for it is not enforceable till the husband's death. Accordingly the principle of the rule is not applicable to distinguishable cases, such as—

1. Where a testator by will gives a sum of money payable under different circumstances from those attaching upon the sum under the covenant—for the legacy *prima facie* imports "a bounty and an intention of kindness absent in the case of intestacy."

2. Where the covenant is enforceable before the husband's death, *e.g.* where, as in *Oliver v. Brickland*, 3 Atk. 420, the husband covenants to pay a sum within two years after marriage, and dies after that period and intestate, the widow's distributive share is held not to be a performance of the covenant.

See on both these points the cases referred to in *Gartshore v. Charlie*, *loc. cit.*

3. And generally the test for the application of the doctrine being the intention of the covenantor where the facts of the case make it clear that he did not intend the subsequent act as a performance of the covenant, it will not be held so to be. See the leading case of *Crouch v. Stratton* (1799, 4 Ves. 391; 4 R. R. 230). By the marriage settlement the husband covenanted by way of making some provision for his wife and her issue, to pay within three months after his death £6000 to the trustees in trust if the wife should survive him and there should be no issue, to pay £1500 to the wife, and the interest on the remaining £4500 to her for life; there was no issue of the marriage, and the husband died intestate; it was held that the widow's share under the Statute of Distributions was not a performance of the covenant. The fact that the husband had given a life interest was the chief index of his intention relied on. To quote the



argument, the fund of £1500 being blended with the provision relating to the £4500, "it could not be the intention that a part of the sum secured by the whole effect of the entire covenant should be taken as a satisfaction, and the interest of the other part should not go likewise in discharge of the distributive share. If it is to turn upon the supposed intention, the same evidence that shows the intention that the £1500 is to go, as it were, into hotchpot, must likewise make, that the value of the life interest must be brought into hotchpot in the same manner." And from this we may deduce that where the subject-matter of the covenant includes a life interest, the presumption of performance by devolution on intestacy is rebutted not only as regards such life interest itself, but also as regards any other gift blended with it.

**Per Hundred.**—Such a phrase as this will primarily receive its ordinary signification. At the same time if an Act of Parliament or custom has given to a phrase of quantity some definite specific meaning, and an instrument coming within such Act or custom uses it, the presumption will be that it is used in that sense. If the question is one of usage, parol evidence will be admissible to prove the customary sense of the phrase. So parol evidence may be given to show a custom to consider 1000 as equivalent to 100 dozen, or 100 ling or cod as meaning six score; for the word "hundred" does not mean necessarily that number of units, a hundredweight, for example, consisting of 112 lbs. (see *Smith v. Wilson*, 1832, 3 Barn. & Adol. 728).

**Perils of the Road.**—The general rule as to these is that the traveller takes his risk of injury by them (see *Young v. Davis*, *infra*; CAVEAT ACTOR, vol. ii. p. 405, and the next reference), unless the injury is due to the actionable NEGLIGENCE of another, or to a NUISANCE, in respect of which he can sue. For an injury by the non-repair of a road no action lies against any public authority which ought to do the repairs (*Russell v. Men of Devon*, 1788, 2 T. R. 677; 1 R. R. 585; see *Saunders v. Holborn Board of Works*, [1895] Q. B. 64, and the cases there cited). It is doubtful how far this rule of non-liability extends to a private person who ought to repair (see *Young v. Davis*, 1862, 7 H. & N. 760). See further, vol. vi. p. 192, and vol. ix. pp. 91, 92.

A carrier of goods at the common law is liable to the owner for any damage they suffer by the perils of the road, or river (see CARRIER, vol. ii. p. 386), or sea (see CARGO, vol. ii. p. 378). As to the liability of a carrier, *e.g.* a railway company, in respect of passengers, see vol. ii. p. 392.

**Perils of the Sea.**—This is a common phrase in marine policies, charter-parties, and bills of lading to denote loss *ex marinæ tempestatis discrimine*, the natural accidents peculiar to that element, and even events not attributable to natural causes (Abbott, 5th ed., 254). Arnould defines the phrase as meaning, in policies, all kinds of marine casualties, such as shipwreck, foundering, stranding, and every species of damage to the ship or goods at sea by the violent and immediate action of the winds and waves, not comprehended in the ordinary wear and tear of the voyage, or directly referable to the acts and negligence of the assured as its proximate cause (744). In contracts of sea carriage the words "peril of the sea" have been



defined as "sea damage occurring at sea and nobody's fault" (Lopes, L.J., quoted in *Hamilton v. Pandorf*, 1887, 12 App. Cas. 518, 526), but this definition is not exhaustive, for damage caused by the negligent navigation of another ship colliding with the carrying ship is a peril of the sea (see *post*); and in a marine policy it has been defined as "all perils, losses, and misfortunes of a marine character or of a character incident to a ship as such" (Lord Bramwell in *Thames and Mersey M. I. C. v. Hamilton*, 1887, 12 App. Cas. 492). The expression has the same meaning in a contract of sea carriage as it has in a marine policy; but in the case of a contract of carriage the Court looks to what has been termed the remote as distinguished from the proximate cause of damage, whereas in the case of a policy the proximate cause can alone be regarded (Lord Watson, *Hamilton v. Pandorf*, above, and Lord Fitzgerald, *ibid.*); and thus under a policy a loss caused by a peril of the sea to the thing insured, which would not have arisen except for the negligence of the assured's servants on board the ship, is recoverable from the underwriter, while in the like case, under a contract of sea carriage, in spite of the ordinary exception of losses by perils of the sea, the shipowner would still be liable, unless he has expressly excepted liability for his servants' acts or negligence (*Dixon v. Sadler*, 1839, 5 Mee. & W. 405; *Grill v. General Iron S. C. C.*, 1866, L. R. 1 C. P. 600).

The following statement indicates the limitations of the phrase: "The term does not cover every accident or casualty which may happen . . . on the sea. It must be a peril of the sea. Again, it is well settled that it is not every loss or damage of which the sea is the immediate cause that is covered by these words. They do not protect, for example, against that natural and inevitable action of the winds and waves which results in what may be described as wear and tear. There must be some casualty, something which could not be foreseen, as one of the necessary incidents of the adventure. The purpose of the policy (or contract) is to secure an indemnity against accidents which may happen, not against events which must happen. Not only losses which are occasioned by extraordinary violence of the winds or waves are losses by perils of the sea. . . . If a vessel strikes upon a sunken rock in fine weather and sinks, this is a loss by perils of the seas. And a loss by foundering owing to a vessel coming into collision with another vessel, even when the collision results from the negligence of that other vessel, falls within the same category. . . . Only one case throws a doubt upon the proposition that every loss by incursion of the sea due to a vessel coming accidentally (using that word in its popular sense) into contact with a foreign body which penetrates it and causes a leak is a loss by a peril of the sea (*Cullen v. Butler*); but this stands alone, and has not been sanctioned by subsequent cases" (Lord Herschell, *The Xantho*, 1887, 12 App. Cas. 503, 509).

"Perils of the sea" include (a) damage by sea-water (*Hagedorn v. Whitmore*, 1816, 1 Stark. 157, ship taken in tow by a man-of-war, and in order to keep up with her carrying a press of sail in a gale and heavy sea, and thereby shipping water and damaging her cargo; *Montoya v. London A. C.*, 1851, 6 Ex. Rep. 451, hides and tobacco carried together, and the hides in bad weather becoming wetted and rotten, and tainting the tobacco); (b) damage by collision for which the ship carrying the cargo is not to blame (*The Xantho*, above); (c) damage by rats, a sunken rock, an iceberg or a swordfish (*Hamilton v. Pandorf*, above), or cannon shot (*Cullen v. Butler*, 1816, 5 M. & S. 461; 17 R. R. 400; but see *The Xantho*, above), which lets in sea-water; (d) damage to cargo by rough weather beyond the ordinary wear and tear of the voyage, if the stowage of the cargo was originally



sufficient (*The Catherine Chalmers*, 1874, 32 L. T. 847), but not if this was carelessly and improperly done (*The Oquendo*, 1878, 38 L. T. 151); (e) captures by pirates (*Pickering v. Barclay*, 1648, Style, 132) or wreckers (*Bondrett v. Hentigg*, 1816, Holt, 149; 17 R. R. 625), or detention by officials of a foreign Government for fees and dues in respect of general average (*Dent v. Smith*, 1869, L. R. 4 Q. B. 414); (f) stranding of the ship, where this is fortuitous and does not necessarily arise in the course of the voyage (*Fletcher v. Inglis*, 1819, 2 Barn. & Adol. 315; 20 R. R. 448), e.g. by a light on shore being purposely extinguished (*Ionides v. Universal M. I. C.*, 1863, 14 C. B. N. S. 259; and see STRANDING, *post*); and (g) any damage done by the force of the elements, e.g. spars or cargo carried away in a gale, or cattle dying from the violent agitation of a ship in a storm (*Lawrance v. Aberdeen*, 1821, 5 Barn. & Ald. 407; 24 R. R. 299).

On the other hand, perils of the sea do not include (1) ordinary wear and tear; (2) the negligence of the shipowner or his servants in the stowage of cargo or the navigation or management of the ship; (3) the initial unseaworthiness of the ship (*The Glenfruin*, 1885, 10 P. D. 103); (4) war perils (*The Patria*, 1871, L. R. 3 Ad. & Ec. 436, avoiding an enemy port; *Taylor v. Curtis*, 1816, 6 Taun. 608; 16 R. R. 686, resisting a privateer); (5) arrest or confiscation of ship or goods in legal proceedings (*Spence v. Chadwick*, 1847, 10 Q. B. 517; *Benson v. Duncan*, 1849, 3 Ex. Rep. 644); (6) loss due to natural causes, e.g. cattle dying of hunger from want of food owing to prolongation of the voyage (*Gabay v. Lloyd*, 1825, 3 Barn. & Cress. 793; *Tatham v. Hodgson*, 1796, 6 T. R. 656; *Gregson v. Gilbert*, 1783, Doug. 232), damage by sea-water to an electric cable not sufficiently insulated (*Paterson v. Harris*, 1861, 1 B. & S. 336), damage by worms (*Rohl v. Parr*, 1796, 1 Esp. 445; 5 R. R. 741), or by rats (*Laveroni v. Drury*, 1852, 8 Ex. Rep. 166; *Kay v. Wheeler*, 1867, L. R. 2 C. P. 302), or (in the United States) by cockroaches (*The Miletus*, 1866, Parson's *Shipping*, i. 258 n.), or leakage (*Crofts v. Marshall*, 1836, 7 Car. & P. 397), or collocation of cargo, consisting of animal, vegetable, and to some extent putrescible matter, and want of due ventilation (*The Freedom*, 1871, L. R. 3 P. C. 594), or cargo damaged by the means of ventilation having to be kept closed for a week in exceptionally heavy weather at sea (*The Thrunscoc*, [1897] Prob. 301); (7) barratry (*The Chasca*, 1875, L. R. 4 Ad. & Ec. 446); (8) or under an ordinary bill of lading, "shipped in good order and condition, etc.," any risks prior to the ship sailing with the goods on board, e.g. during the loading and stowing of the cargo (Lord Cairns and Lord Selborne, *Steel v. State Line*, 1877, 3 App. Cas. 72, 78, 84); (9) fire or lightning (Lord Bramwell, *Hamilton v. Pandorf*, above, 527).

A similar phrase to "perils of the sea," and often found either in addition to or substitution for it, is "dangers and accidents of the seas or navigation or management of the ship"; and its meaning is illustrated by the following decisions. Thus under a bill of lading excepting "dangers and accidents of the seas and navigation," the shipowner was held protected from liability for damage due to the negligence of lumpers who were engaged in discharging the cargo after the crew had left (*Laurie v. Douglas*, 1846, 15 Mee. & W. 746); under an exception of "loss or damage by improper navigation of the ship to goods on board her," the shipowner is protected from liability for loss during the voyage by a bilge-cock or a sea-cock being improperly left open (*Good v. London S.S. Owners' Association*, 1871, L. R. 6 C. P. 563). The word "navigation" covers bad stowage which would affect the sailing of the ship (*ibid.*); the overlooking of the machinery by a person on shore which causes the vessel to steer badly (*The Warkworth*, 1884, 9 P. D.



145); the insufficient closing of a port during the loading of the cargo; or sending a ship to sea without a compass; for "negligence before the navigation begins, which has the effect of causing the ship to be unsafely navigated during the navigation with regard to the safety of the goods, makes the navigation improper navigation by the shipowner" (Lord Esher, M. R., *Carmichael v. Liverpool Sailing Shipowners M. I. A.*, 1887, 19 Q. B. D. 242, 248). Where by the rules of a mutual insurance association shipowners were protected in respect of "damage to goods on board when caused by the improper navigation of the ship," but not in respect of "damage caused by improper stowage," and cargo was damaged owing to a previous cargo not having been thoroughly cleaned out of the ship, this was held not to fall within "improper navigation" (but perhaps within "improper stowage") (*Canada Shipping Co. v. British Shipowners' M. P. A.*, 1889, 22 Q. B. D. 727; 23 *ibid.* 342). Under a charter-party "any act, neglect, or default of shipowners' servants, and all dangers and accidents of the seas . . . and navigation during the said voyage always excepted," where a valve in the engine-room was negligently left open by an engineer of the vessel during the loading of the ship at a port to which she had proceeded under the contract, the damage resulting therefrom was held covered by the exception (*The Carron Park*, 1890, 15 P. D. 203); while under a charter-party excepting liability for "any act, negligence, or default of master and crew in the navigation of the ship in the ordinary course of the voyage," damage done in the port of discharge by a bilge-pump being negligently removed for repair by the chief engineer of the ship and the workmen of a marine engineer on shore was held not covered by the exception (*The Accomac*, 1890, 15 P. D. 208). Under a charter-party and bill of lading both excepting "perils of the sea . . . and other accidents of navigation, even when occasioned by the negligence of the master," damage to cargo done by a leak caused by heavy weather during the voyage, and not stopped owing to the negligence of the master, was held to be covered (*The Cressington*, [1891] Prob. 152). Under a bill of lading excepting "damage from any act, neglect, or default by pilot, master, or mariners in the navigation or management of the ship," damage done to a cargo of oranges by their improper stowage by the stevedore was held not to be covered (*The Ferro*, [1893] Prob. 38); and it was said that "bad stowage" does not fall within "navigation" (except as above), nor perhaps within "management" (Barnes, J., *ibid.* 46). Under a charter-party and bill of lading which exempted shipowners from liability for damage to cargo from "perils, dangers, and accidents of the sea or other waters, strandings . . . and all other accidents of navigation . . . even when occasioned by negligence, default, or error in judgment of the shipowners' servants, but unless stranded, sunk, or burnt nothing to exempt shipowner from liability to pay for damage to cargo . . . by improper opening of valves . . . or causes other than those above excepted," where the engineer negligently omitted to close a valve which he had opened in the side of the ship as she lay at her moorings, and the cargo was thereby damaged, and the master, to prevent the ship sinking, had her towed into shallow water, where she settled, it was held that the negligence clause applied to "dangers and accidents of the sea and other waters" as well as "accidents of navigation," and that the words "unless stranded, sunk, or burnt" protected the shipowner from liability for the damage done by the valve being left open; and Barnes, J., intimated that he was inclined to consider that accidents of navigation covered the loss, the vessel having a cargo in her, and something being done for a proper purpose affecting its safety at the time that the accident occurred (*The Southgate*,



[1893] Prob. 329, 337). Where a charter-party incorporated the provisions of the United States Harter Act of 1893, by which shipowners are bound to use due diligence in making the ship seaworthy and properly supplied and manned, but are not liable for faults or errors in the navigation and management of the ship, and the ship went to sea unseaworthy owing to the negligence of the ship's carpenter, the shipowner was held liable (*Dobell v. Rossmore S.S. Co.*, [1895] 2 Q. B. 408, 415); and under a similarly expressed bill of lading, where the ship after her arrival at her port of discharge had to be stiffened, and the engineer filled a ballast tank without first ascertaining the conditions of the sounding pipe and casing, which had been broken by heavy weather during the voyage, and water thereby got in and damaged the cargo, it was held that the shipowner was exempt from liability, the loss being covered by the "management" of the vessel, which extended to the time of discharge of cargo, as well as to the time of the ship being at sea (*The Glenochil*, [1896] Prob. 10). "Management" goes somewhat beyond (perhaps not much beyond) "navigation," but far enough to take in this very class of acts which do not affect the sailing or movement of the vessel, but do affect the vessel herself (Jeune, P., *ibid.*). It means a fault in the management of the vessel in doing something necessary for the safety of the ship herself; and generally all exemptions extend from the time the cargo is taken on board to the discharge, though the terms of the exemptions themselves may not necessarily cover the particular act (Barnes, J., *ibid.*).

Under a bill of lading, excepting perils of the sea, but not negligence of the master and crew, the shipowner need only prove that the loss apparently falls within perils of the sea, and need not show that it was a peril of the sea not occasioned by his fault (*The Glendarroch*, [1894] Prob. 226).

In the statutory policy (see MARINE INSURANCE), the words "and all other perils" follow after the enumerated perils. These words, however, only include "cases of marine damage of the like kind with those which are specially enumerated and occasioned by similar causes" (Lord Ellenborough, *Cullen v. Butler*, 1816, 5 M. & S. 461; 17 R. R. 400, confirmed in *Thames and Mersey M. I. C. v. Hamilton*, 1887, 12 App. Cas. 484, 498, Lord Herschell). The following losses have been held to fall within this clause: where a British ship was fired upon and sunk by another, which mistook her for an enemy (*Cullen v. Butler*, 1816, 5 M. & S. 461); dollars thrown overboard by a master at the moment of capture, to prevent their falling into the hands of the enemy (*Butler v. Wildman*, 1820, 2 Barn. & Ald. 398); ship in a graving dock thrown over by a violent gust of wind (*Phillips v. Barber*, 1821, 5 *ibid.* 161); ship bilged and rendered incapable of pursuing her voyage by the accidental giving way of her tackle or supports while being moved out of a dock where she had been placed for repairs (*Devaux v. F Anson*, 1839, 5 Bing. N. C. 519); cargo damaged by sea-water entering through waste-pipe accidentally left open (*Davidson v. Burnand*, 1868, L. R. 4 C. P. 117). The clause has been held not to include a meat cargo going bad owing to delay on the voyage by bad weather (*Taylor v. Dunbar*, 1869, L. R. 4 Q. B. 206); and the bursting of the air-chamber of a donkey-pump by cold sea-water being forced up into it, owing to the accidental or negligent closing up of a valve at the end of a supply pipe connecting the donkey-pump with the ship's boilers, does not come either within "perils of the sea" or the general words (*Thames and Mersey M. I. C. v. Hamilton*, above).

[*Authorities.* — Abbott, *Shipping*; Carver, *Sea Carriage*; Scrutton, *Charter-Parties*.]



**Perinde valere**—A dispensation granted to a clerk admitted to a benefice, though incapable of holding it. So named from the words of the dispensation, which make it as effectual to the party as if he were capable (Gibson, *Codex*, p. 87). The right of granting such dispensation was among those taken from the pope and vested in the Archbishop of Canterbury by 25 Hen. VIII. c. 21, 1533.

**Periodical Publication.**—See COPYRIGHT.

**Perishable Goods.**—Where goods, the subject of a contract of sale, are of a perishable nature, and the buyer does not within a reasonable time pay or tender the price, the unpaid seller may resell the goods and recover from the original buyer damages for any loss occasioned by his breach of contract (Sale of Goods Act, 1893, s. 48 (3)).

A common carrier is not bound to carry perishable goods, such as fish (Macnamara on *Carriers*, pp. 23, 77; see *Beal v. South Devon Rwy. Co.*, 1860, 5 H. & N. 475), which he does not profess to carry. If he takes them and holds them under his lien, he must exercise proper care to preserve them (Macnamara, p. 102). It is the duty of the sender, where the goods sent require special care, to give notice to the carrier. If no such notice is given, and the necessity is not apparent, the carrier need only treat them in the usual way (*Baldwin v. L. C. & D. Rwy. Co.*, 1882, 9 Q. B. D. 582). He is not liable for damage to the goods caused by reason of their condition (see CARRIER, vol. ii. p. 385; *The Ida*, 1875, 32 L. T. N. S. 541). Loss by deterioration, where it is an ordinary probable consequence of delay, so far as it might be expected to happen to goods of the kind, is recoverable from the carrier as damages if he is liable for the delay (*Hawes v. S.-E. Rwy. Co.*, 1885, 52 L. T. 514). The master of a ship has authority to sell goods forming part of the cargo if there is a "commercial necessity" to do so in order to save them (Carver, *Carriage by Sea*, 2nd ed., p. 304; see *Atlantic Mutual Insurance Co. v. Huth*, 1880, 16 Ch. D. 474).

It is provided by Order 50, r. 2, that it shall be lawful for the Court or a judge, on the application of any party (*i.e.* to proceedings pending in respect to the goods), to make any order for the sale, by any person or persons named in such order, and in such manner, and on such terms as the Court or judge may think desirable, of any goods, wares, or merchandise which may be of a perishable nature, or likely to injure from keeping. See note to the rule in the *Annual Practice*; and also, as to the protection of a purchaser on such sale, Conveyancing Act, 1881, s. 70.

**Perjury.**—HISTORY.—Perjury, like FORGERY, has a somewhat curious history in English law. It rarely if ever appears in the earlier records as an offence cognisable by the temporal Courts; and the fact that neither forgery nor perjury were within the cognisance of justices or Courts of Quarter Sessions (*R. v. Bartlett*, 1843, 12 L. J. M. C. 127; Hawk. P. C. bk. ii. c. 8) suggests either (1) that when the commission of the peace was established the offences did not exist; or (2) that they were not then regarded as trespasses or even offences against the king's peace (Archb. *Quarter Sess.*, 5th ed., 1898, p. 43).

There is evidence that oath-breaking was punished under Anglo-Saxon laws, but that half the wite went to the bishop, and for some time after the Conquest it was ordinarily punished as a spiritual offence only (2 Pollock and Maitland, *Hist. Eng. Law*, 539–541).

Plaintiffs or prosecutors who failed in legal proceedings were amerced *pro falso clamore*, or, if suing as paupers, were whipped; but this procedure is merely a substitute for what is now effected by giving costs, since under the early mode of trial in England



the parties could not give evidence, and no sworn evidence was given (*ibid.* p. 541). The inquests or assizes were themselves the witnesses in substitution for the old compurgators, and the earliest proceeding at all resembling perjury was that by writ of attain against an assize, which brought in a false verdict in civil proceedings (1 Pike, *Hist. Cr.* 126, 202, 386; 2 Pollock and Maitland, *Hist. Eng. Law*; and see *ATTAINT*).

But under the systems of compurgation and frankpledge undoubtedly an enormous amount of false swearing took place unpunished; and under the jury system local opinion and independence asserted itself by false verdicts, which saved the district or the accused whom they favoured (1 Pike, *Hist. Cr.* 57-61).

Even when the practice of calling witnesses on oath came in, it was not until 1702 extended to witnesses for the defence in treason or felony (1 Anne, st. 2, c. 9, s. 3).

Coke (3 *Inst.* 163) deals with perjury as an offence at common law punishable by fine and imprisonment, but cites a case in the Star Chamber where as late as 1612 (10 Jac. I.) it was argued and decided that perjury in a witness for the king was punishable by the common law (*In re Rowland ap Eliza*, 3 Co. *Inst.* 164).

This opinion has, with whatever historical warrant, now become firmly established. But it was not so in the sixteenth century. In 1495 (7 Hen. VII. cc. 24, 25) provision was made for writs of attain for false verdicts and proceedings against inquests (juries) for perjury in the king's Courts or in Chancery, and a like provision is made by c. 21 for perjury by city of London juries. In 1541 (32 Hen. VIII. c. 9, s. 3) a penalty is imposed for the subornation of witnesses by letters, rewards, promises, or by any other sinister labour or means . . . to the procurement or occasion of any manner of perjury by false verdict or otherwise in any manner of Court "of the king." In 1563 (5 Eliz. c. 9) this Act was recited; and increased penalties were imposed for such subornation in any secular Court; and wilful and corrupt perjury by witnesses was made punishable by fine of £20, imprisonment, and disqualification to testify. Jurisdiction was given to Courts of assize and Quarter Sessions (s. 3). Perjury in spiritual Courts was left untouched (s. 5). By sec. 7 there were reserved all pre-existing powers of any judge having absolute power to punish perjury.

The passing of these Acts indicates that the early conception of perjury was perjury by false verdict. This has disappeared from the category of offences; jurors, except in the case of *EMBRACERY*, having absolute and almost judicial immunity.

The Act of Elizabeth certainly suggests that perjury by witnesses was then for the first time made an offence cognisable by the temporal Courts. But on the general adoption of Lord Coke's view, the statutes of the sixteenth century, while even now unrepealed, have fallen into disuse, and are not even mentioned in Archbold, 21st ed.; and prosecutions for perjury are always for the common law perjury or under specific statutes containing a special perjury clause. None of these statutes contains a complete definition of the offence, and recourse must therefore be had to the supposed common law definition.

Coke defines perjury as a crime committed when a lawful oath is administered by a person having authority to do so, to any person in any *judicial proceeding* who swears *absolutely* and falsely in a matter material to the issue or cause in question, whether by his own act or the subornation of others (3 Co. *Inst.* 164).

Qualified by his explanation that the authority to administer the oath must be derived from a commission recognised by the common law (3 Co. *Inst.* 165), the definition almost correctly states the law as now understood with respect to common law perjury. But this limitation, coupled with legislative caution, has been the cause of the passing of very many enactments imposing the penalties of perjury on persons falsely swearing before authorities created by statute; most, if not all, of these enactments are collected in the official index to the statutes, *s.v.* "Perjury." Attempts were unsuccessfully made in 1894, 1895, and 1896 to pass a Perjury Act to give the offence a sufficiently wide statutory definition, and to repeal and supersede most of these enactments.

**MODERN LAW.**—This statement of the history of the subject indicates the confusion and complexity caused by absence of any systematic dealing with the offence.

In the Criminal Code Bill of 1880 it was proposed to treat perjury and cognate offences, involving the making of false statements intended to be used as evidence, under three classes—

- (1) False statements on oath in judicial proceedings;
- (2) False statements on oath otherwise than in judicial proceedings;
- (3) False statements not on oath.



The best modern definition of perjury is that of Stephen: "An assertion upon an oath duly administered in a judicial proceeding before a competent Court of the truth of some matter of fact material to the question depending in that proceeding, which assertion the assertor does not believe to be true when he makes it, or on which he knows himself to be ignorant" (see *R. v. Aylett*, 1785, 1 T. R. 63; 1 R. R. 152). It is immaterial whether the assertion is oral or in writing, *e.g.* by affidavit (52 & 53 Vict. c. 10, s. 7). The statutes permitting affirmation instead of oath make the witness who affirms falsely subject to the penalties of perjury (3 & 4 Will. IV. c. 49; 1 & 2 Vict. c. 77; 51 & 52 Vict. c. 46; 52 & 53 Vict. c. 63, s. 3). The form of the oath is immaterial so long as it is binding on the conscience of the person taking it, and acceptance of the form is an admission that it is so binding (1 & 2 Vict. c. 105; *Sells v. Hoare*, 1822, 3 B. & B. 232).

Stephen's explanation, of "duly administered," goes beyond Coke's definition. It is "administered in a form binding on his conscience to a witness legally called before a Court, judge, justice, officer, commissioner, arbitrator, or other person, who, by the law for the time being in force or by the consent of the parties, has authority to hear, receive, and examine evidence." This is really an expansion of the old definition by the light of 14 & 15 Vict. c. 99, s. 16, passed in consequence of *R. v. Hallett*, 1851, 2 Den. Cr. C. 237, so as to legalise the administration of an oath in the case of all tribunals public or domestic.

To make the proceeding "judicial," it must be one taken in the course of a civil, criminal, ecclesiastical, military, naval, or other trial or inquest, or a proceeding of a judicial nature, in which evidence is taken on oath and examined with a view to establish a right, liability, or obligation: such as an arbitration (52 & 53 Vict. c. 49, s. 22); and it appears to include proceedings before a committee of either House of Parliament hearing witnesses, or before any other special tribunal appointed by the Crown and having authority to administer an oath (*R. v. Tomlinson*, 1866, L. R. 1 C. C. R. 49). The tribunal must be competent to deal with the case in which the false assertion is made, otherwise the proceeding is *coram non judice*. The distinction between competence and regularity of procedure is clearly stated in *R. v. Hughes*, 1879, 4 Q. B. D. 614; *R. v. Johnson*, 1872, L. R. 2 C. C. R. 15. As already pointed out, in the case of a Court or person not having authority at common law to administer an oath, reference must be made to the statute giving such authority; and the question whether the proceeding is judicial or not is rendered unimportant in the case of oaths administered under Acts which contain a perjury clause. For instance, false oaths before certain persons for the purpose of marriage are punishable as perjury, though the proceeding cannot be described as judicial (*R. v. Chapman*, 1849, 31 L. J. M. C. 152; 6 & 7 Will. IV. c. 85, s. 38); and a similar provision is made as to affidavits on registration of a bill of sale *ante* (*R. v. Hodgkess*, 1870, L. R. 1 C. C. R. 212; 41 & 42 Vict. c. 31, s. 17). Coke's definition somewhat differs from that of Stephen. In speaking of swearing "absolutely" as to a matter, Coke considered that swearing to opinion was not perjury; but this is inconsistent with modern decisions, *e.g.* *R. v. Schlesinger*, 1847, 10 Q. B. 670.

The fact or opinion sworn to must be material or relevant to the matters into which the tribunal is inquiring, *i.e.* of such a nature as directly or indirectly to affect the probability of the existence of any fact to be determined in the inquiry or the credit of a witness, although evidence of its existence was improperly admitted (*R. v. Gibbon*, 1861, L. & C. 109; *R. v. Philpotts*, 1851, 2 Den. Cr. C. 302). It had been doubted whether false



answers to questions going to credit only were material (*R. v. Mullaney*, 1865, L. & C. 593), but in *R. v. Baker*, [1895] 1 Q. B. 797, they were settled to be material.

It has been at times suggested that perjury or prevarication can be summarily dealt with as contempt of Court, but there is no judicial decision to this effect. It is a common law misdemeanour, punishable by fine or imprisonment, to make false statements on oath in proceedings which are not judicial, or to fabricate documentary or other evidence for use in a judicial proceeding (*R. v. Vreones*, [1891] 1 Q. B. 360).

The common law has been supplemented by many statutes punishing false statements on oath under such circumstances, which are collected for repeal in the schedules to the perjury bills of 1894, 1895, and 1896, and in the official index to the statutes.

There are also many statutory offences akin to perjury with respect to statements, certificates, or declarations not made on oath or the equivalent affirmation, but made at the command or under the authority of Courts, judges, or magistrates, or by or in pursuance of statutes or Orders in Council, rules, by-laws, or other instruments under statutes. The most important Act is the Statutory Declarations Act, 1835 (5 & 6 Will. IV. c. 62), under which statutory declarations have been substituted for oaths on the verification of very many matters concerned with the public revenue or questions of title to property.

*Subornation, etc.*—Subornation of perjury was punishable in the same way as perjury under the Acts of 1541 and 1563, and is specially referred to in the Acts relating to punishment mentioned below. It is the inciting, counselling, or procuring a witness to commit perjury which is actually committed, and falls within the common law as to such offences, and is also covered by sec. 8 of the Accessories, etc., Act, 1861.

Counselling or procuring the commission of the cognate offences already mentioned is also indictable or summarily punishable in the same manner as the principal offence, if it is committed. When the principal offence is not committed, incitement to the commission of perjury or any cognate indictable offence is a misdemeanour (see INCITEMENT and CONSPIRACY). What is hereafter said as to punishment and procedure with respect to forgery applies to subornation of the offence, save that to convict of subornation the principal offence must also be charged and proved.

The fabrication of evidence for use in a judicial proceeding is an indictable misdemeanour, even if no perjury is in fact committed (*R. v. Vreones*, [1891] 1 Q. B. 360).

*Punishment.*—The statutory penalties under the Acts of 1541 and 1563 are never inflicted. The common law penalty was fine and imprisonment and PILLORY, or by requiring sureties (*Dunn v. R.*, 1849, 12 Q. B. 1026).

In 1729 (2 Geo. II. c. 25, s. 2) Courts were authorised to punish wilful and corrupt perjury, or subornation of it, by imprisonment with hard labour for not over seven years, or transportation over seas for a like period. The first of these punishments has been superseded under 3 Geo. IV. c. 114 by a general power to impose hard labour; and penal servitude for not less than three nor more than seven years has been substituted for transportation (see 54 & 55 Vict. c. 69, s. 1). These Acts apply to false oaths taken in a manner authorised by subsequent statutes. It is not necessary to impose fine and imprisonment as well as penal servitude; and successive sentences of penal servitude may be imposed in different Courts on the same indictment (*Castro v. R.*, 1881, 6 App. Cas. 229).



*Procedure.*—Perjury is at common law triable in the judicial district in which the false oath is taken. Provision is, however, made in certain statutes that perjury in an affidavit or a deposition taken on commission shall be triable in the district where the cause was pending in which the affidavit or deposition was taken (52 & 53 Vict. c. 10, s. 9).

No Court of Quarter Sessions has jurisdiction to try perjury or subornation of perjury, or making or suborning any other person to make a false oath, affirmation, or declaration punishable as perjury or as a misdemeanour (5 & 6 Vict. c. 38, s. 1 (6) (7)). The Vexatious Indictments Act, 1859 (22 & 23 Vict. c. 17), applies to all prosecutions for perjury or subornation of perjury, but is not so framed as to include the cognate offences just mentioned. It does not, however, extend to prosecutions instituted by the direction or with the written consent of a judge of the Supreme Court, or of the Attorney-General or Solicitor-General, or by the direction of any other Court, judge, or public functionary authorised by 14 & 15 Vict. c. 100, s. 19, to direct a prosecution for perjury in evidence given before him, *i.e.* besides the judges of the Supreme Court, Courts of Quarter Sessions, and the judges or deputy judges of inferior civil Courts of record. Where prosecutions are ordered under the Act of 1859, the accused is committed for trial without preliminary inquiry, and the costs of prosecution may be paid, as in cases of felony, on production of a certificate that it was so ordered.

By secs. 20, 21 of the Act of 1851 it was attempted to simplify the form of indictments for perjury, or unlawfully, wilfully, falsely, fraudulently, deceitfully, maliciously, or corruptly making or signing oaths, affirmations, affidavits, depositions, notices, certificates, or other writings, or for suborning, bargaining, or contracting for, or inciting, counselling, or procuring any of these offences. It is unnecessary to set out the commission of the Court in which the perjury was committed, or any part of the proceedings, or the document alleged to have been falsely sworn to, and it is sufficient to state the substance of the offence and specify the Court or person before whom the false oath was taken. In subornation it is enough to set out the perjury as above, and then to aver that the suborner unlawfully, wilfully, or corruptly did cause and procure the perjurer the said offence in manner and form aforesaid, to do and commit. But it is also possible, and simpler, to indict the suborner as a principal offender under sec. 8 of the Accessories, etc., Act, 1861.

These enactments render it needless to aver the competence of the Court in which the perjury was committed, or to go into detail as to the nature of the judicial proceeding in which it was committed (*R. v. Dunning*, 1871, L. R. 1 C. C. 290), or the nature of the authority of the person administering the oath (*R. v. Callanan*, 1826, 6 Barn. & Cress. 102).

The precedents in use (see Archbold, *Cr. Pl.*, 21st ed.) are still, from excess of caution, needlessly archaic, detailed, and prolix. The essentials of the indictment are: "In the introductory part of the indictment circumstances are stated which show that the oath was taken in a judicial proceeding before a competent jurisdiction, and was material to the matter then before the Court (if that is not obvious from the oath); the oath is then set out verbatim (with the innuendoes necessary to explain it), and the perjury is then assigned on it, *i.e.* some one or more of the affirmative assertions in it are negatived, or the negative assertions contradicted by its opposite affirmative" (Archbold, *Cr. Pl.*, 21st ed., 937).

It was held in *R. v. Cox* (1770, Leach, 65) that in an indictment for common law perjury, the word "wilful" need not be inserted, and that falsely,



maliciously, wickedly, and corruptly are the proper terms of art. But the word is necessary in an indictment under the Act of 1563, and to warrant punishment under 2 Geo. II. c. 25, s. 2, must be inserted, and is now always inserted.

It is not uncommon, but is superfluous, to insert a syllogistic conclusion; "and so the jurors aforesaid, on their oath aforesaid, do present that the defendant, on the day of                      before                      , by his own act and consent, and of his own most wicked and corrupt mind, in manner and form aforesaid, falsely, wickedly, wilfully, and corruptly did commit wilful and corrupt perjury, to the great displeasure of Almighty God (a relic of the ecclesiastical aspect of the crime) and in contempt of our Lady the Queen and her laws, and against, etc." (*Ryalls v. R.*, 1847, 11 Q. B. 781; *R. v. Hodgkiss*, 1870, L. R. 1 C. C. 212).

*Evidence.*—The one exceptional rule of evidence as to perjury is that a conviction may not take place unless the falsity of the oath is proved by two witnesses, or by one witness, corroborated by proof of other material and relevant facts (Archbold, 21st ed., 941).

It is also necessary to show that the oath was not only false but recklessly or deliberately false, and usually that the accused had his attention pointedly called to the question involved, so as to exclude the hypothesis of inadvertence or mistake (*R. v. London*, 1871, 12 Cox C. C. 50).

The further matters which must be proved in a prosecution for perjury, are that the oath was lawfully administered by a competent Court or person; that the statements made were material to the question in controversy; that the proceeding was judicial, or one to false swearing wherein the penalties of perjury attach; and that the statement was false, to the knowledge of the person who made it.

But on failure to prove the proceeding to be judicial, the accused may still be convicted of the misdemeanour of taking a false oath.

Where the Court or person administering the oath has a limited jurisdiction, it is necessary to prove all the facts necessary to give such jurisdiction (*R. v. Lewis*, 1871, 12 Cox C. C. 163; *R. v. Evans*, 1890, 17 Cox C. C. 37; *R. v. Shaw*, 1865, L. & C. 579). But this does not preclude liability for perjury where an irregularity in procedure has occurred, and has been lawfully waived (*R. v. Fletcher*, 1871, L. R. 1 C. C. 320); or is of a trifling character (*R. v. Western*, 1868, L. R. 1 C. C. 122). But where a registrar in bankruptcy swore a witness, and was not present at his examination, the irregularity was held fatal (*R. v. Lloyd*, 1887, 19 Q. B. D. 213).

The nature of the proceedings pending must be proved by producing the record, if any, or the documents on which the proceeding was founded, subject, in the case of perjury at a trial for felony or misdemeanour, to a right to prove that trial by certificate without making up the record (14 & 15 Vict. c. 100, s. 22), or in a civil trial, or the High Court, to the production of the record or an examined copy (14 & 15 Vict. c. 99, s. 13; 14 & 15 Vict. c. 100, s. 22); or official documents emanating from the Court showing the nature and result of the trial (*R. v. Scott*, 1877, 2 Q. B. D. 415).

[*Authorities.*—Archbold, *Cr. Pl.*, 21st ed.; Stephen, *Dig. Cr. Law*, 5th ed.; Russell on *Crimes*, 6th ed.; Mayne, *Indian Cr. Law*, ed. 1896, p. 503.]

**Permissive Waste.**—See WASTE.



**Permutation**—A writ directed to the Ordinary, commanding him to admit a clerk to a benefice upon an exchange.

**Per my et per tout.**—See JOINT-TENANCY, vol. vii. at p. 102.

**Pernancy**—The taking or receiving (*prendre*) anything, *e.g.* tithes that are or may be taken in kind.

**Per Pais, Trial by.**—See ACT IN PAIS.

**Perpetual Annuity.**—As a general rule, a gift of an annuity to a person is a gift of an annuity for life, and nothing more (*Blight v. Hartnoll*, 1881, 19 Ch. D. 294; *In re Morgan*, [1893] 3 Ch. 222, and cases there cited). But where the testator indicates the existence of the annuity without limit after the death of the person named, and therefore implies that the annuity is to exist beyond the annuitant's life, then the annuity is presumed to be a perpetual annuity. If the annuity is given by deed without words of limitation, a life-interest alone passes to the annuitant. It is only, therefore, in the case of wills that the question of what amounts to a sufficient expression of intention to give a perpetual annuity has to be considered.

A gift to A. or his descendants gives the various annuitants gift for life only, and *or* will not be read as *and*, so as to give a perpetual annuity (*In re Morgan, ubi supra*); and a gift of "an annuity of £500 a year to be secured to X." is merely an annuity to X. for life, and no more (*In re Lord Stratheden and Campbell*, W. N. (1893) 90). The fact that the annuity is charged upon any particular fund, or a fund given on trust to pay the annuity thereout, or even that the annuity is charged on real estate, does not constitute an indication of an intention that it shall be perpetual (*Blight v. Hartnoll, ubi supra*; *In re Morgan, ubi supra*); and even where there is a gift of residue to trustees upon trust, to invest £10,000 in Consols and retain so much as would realise a clear yearly income of £150, and pay the dividends to the beneficiary, with a gift over on bankruptcy or alienation, the gift of income is not perpetual (*Banks v. Braithwait*, 1862, 11 W. R. 298).

The cases where, otherwise than by virtue of very clear words to that effect, an annuity has been held to be perpetual are mostly old cases, and the circumstances from which an intention to give a perpetual annuity has been deduced may be thus classified:—

1. A direction contained in the will for gift over or cesser if the annuitant dies without issue, clearly points to an intention to confer more than a life annuity; and a bequest of, *e.g.*, £40 a year out of Four per Cent. Bank Stock, followed by a direction that the stock shall not be sold till after the death of the legatee and his wife, nor till his youngest son shall attain twenty-one, is a perpetual annuity (cp. *Potter v. Baker*, 1852, 15 Beav. 489; *Stokes v. Heron*, 1845, 12 Cl. & Fin. 161; *Pawson v. Pawson*, 1854, 1 Q. B. 146; *Robinson v. Hunt*, 1843, 4 Beav. 450).

2. Generally, where, as above stated, the bequest can reasonably be said to be equivalent to a gift of income without reference to any time limit, or where annuities are given *simpliciter* and there follows a direction amounting in effect to a dedication of a portion of the *corpus* of the testator's



property to produce the particular annuity (*Kerr v. Middlesex Hospital*, 1852, 2 De G., M. & G. 576, 587).

3. And a gift may be unlimited in time and in terms though a gift of residue follow; for the latter, in such case, amounts to no more than a gift of all that shall remain after the testator's wishes have been complied with (cp. *Hicks v. Ross*, 1872, L. R. 14 Eq. 141, and cases there cited).

The cases will be found collected in Hawkins on *Wills*, 128 *et seq.*; Theobald on *Wills*, 414; and see ANNUITIES; WILL.

**Perpetual Curate.**—The word “curate” originally applied to all clerks who had the cure of souls. In the Church of England at the present time the word is applied to two classes of ministers.

(1) To temporary curates, who are clerks in holy orders employed under a rector or vicar, either to assist him in the same church, or to execute his office in his absence in the parish church, or else in a chapel-of-ease.

(2) Perpetual curates, properly speaking, are clerks in holy orders who officiate in a parish where there is no spiritual rector or vicar, who are nominated by the impropriator and licensed by the bishop. The word is also applied to the ministers of separate parishes, ecclesiastical districts, consolidated chapelries, and district chapelries formed under the Church Buildings Acts (1 & 2 Will. IV. c. 38, s. 12; 2 & 3 Vict. c. 49, s. 2; 6 & 7 Vict. c. 37, s. 12).

The historical origin of the office of perpetual curate is explained in the article LAY IMPROPRIATOR. It will suffice to repeat here that if a benefice was given to a monastery *in mensam monachorum*, and was granted by way of union *pleno jure*, it did not become a vicarage under 4 Hen. IV. c. 12 (5), but continued to be served by a temporary curate. Dispensations were also sometimes given to monasteries to hold benefices not annexed *ad mensam*, in the same way, either because of the poverty of the monastery or because they were near to the church.

When such appropriations, together with the charge of providing for the cure, were transferred to laymen at the dissolution of the monasteries, such laymen were unable to serve the cures themselves, and were therefore obliged to nominate some person to the bishop for his licence to serve the cure. The curates so appointed therefore acquired a certain fixity of tenure in their benefices, as they were not removable at the pleasure of the impropriator, unless their licence had been duly revoked by the ordinary.

The position of a perpetual curate was further altered by the Act 1 Geo. I. st. ii. c. 10, s. 4, which for some purposes puts him in the position of a vicar. This Act provides that all curacies, chapels, or churches augmented by Queen Anne's Bounty shall be from the time of such augmentation perpetual cures and benefices, and the ministers shall constitute corporations sole (see also ss. 6, 10). Land annexed to a perpetual curacy by Queen Anne's Bounty under this Act cannot be leased by the curate to bind his successor, without the consent of the ordinary, as well as of the patron (*Doe d. Richardson v. Thomas*, 1839, 9 Ad. & E. 556).

The old idea of the perpetual curate as a mere stipendiary rather than an incumbent continued for some purposes, as in *Jenkinson v. Thomas*, 1792, 4 T. R., so that the curate of a curacy augmented under Queen Anne's Bounty was held not to be liable as a parson or vicar to the penalties of 21 Hen. VIII. c. 13 for non-residence, so that a perpetual curacy could be held with another benefice; but this is altered by the Pluralities Act, 1 & 2



Vict. c. 106. For certain other purposes, however, the Courts have treated perpetual curacies as benefices, *e.g.* that it was a cure of souls to which, to enable the curate to be admitted, he must obtain the bishop's licence and subscribe to the Thirty-nine Articles and Declaration of Conformity (*Powell v. Milbank*, 1872, 1 T. L. R. 39 (note)); and the Clerical Subscriptions Act, 1865 (28 & 29 Vict. c. 122) (as to which, see ENTRY ON BENEFICE), applies to a perpetual curate.

To determine whether a place is a perpetual curacy or merely a chapelry, the points to consider are—(1) whether the chapel possesses parochial rights, *e.g.* clerk, wardens, sepulchre, etc.; (2) whether the inhabitants possess parochial rights there, or whether they have to attend the mother-church for sacraments, etc.; (3) whether the curate is entitled to rights and dues, *e.g.* surplice fees, small tithe, etc. If the place possesses these things it will unquestionably be a perpetual curacy. An action in the Chancery Division of the High Court appears to be the proper mode of establishing the right of a place to be a perpetual curacy (*A.-G. v. Brereton*, 1752, 2 Ves. 424).

A perpetual curate differs from a rector or a vicar in that he has possession of the church and churchyard so far only as may be necessary for the performance of his sacred duties, but he has not such an estate as will enable him to take the profits arising from the use of the churchyard for secular purposes, and therefore he cannot restrain by injunction the lay impropriator (or his tenants), in whom the soil and herbage of the churchyard is vested, from depasturing the same (*Greenslade v. Darby*, 1868, L. R. 3 Q. B. 421). The reason for this is that the perpetual curate does not stand in the position of a vicar under 4 Hen. IV. c. 12, and that he can be presumed to have no further possession than necessarily flows from the fact that he has to perform certain duties, and must have a certain possession for that purpose. In certain cases, however, the rights of the lay impropriator may be restrained by local custom; and in many cases a perpetual curate has acquired a *quasi* fee in the soil of the churchyard as against the common law rights of the impropriator (see opinion of Lord Stowell cited, Phillimore, *Eccl. Law*, 2nd ed., i. 228, 229). The question, therefore, as to his exact rights on these points will depend on the circumstances of the particular place. A perpetual curate of a parochial chapelry augmented under Queen Anne's Bounty has, however, such an interest in the chapel as to maintain an action against any person entering the chapel and removing pews; and the chapelwardens may not remove pews without his consent (*Jones v. Ellis*, 1828, 2 Y. & J. 268). Augmented churches and chapels to which a district is assigned become perpetual curacies under 2 & 3 Vict. c. 49, s. 2 (see further, Phillimore, *Eccl. Law*, pp. 243, 244). Sec. 21 of the Act 31 & 32 Vict. c. 117 provides that the incumbent of every parish or new parish for ecclesiastical purposes not being a rector authorised to publish banns of matrimony in such church, and to solemnise therein marriages, churchings, and baptisms, and entitled for his own benefit to the fees arising from such offices without any reservation thereanent, shall, from the passing of that Act for the purpose of style and designation, but not for any other purpose, be deemed and styled the vicar of such church and parish or new parish, and his benefice shall for the same purpose be styled and deemed a vicarage.

See also RECTOR; VICAR; ECCLESIASTICAL COMMISSIONERS; ECCLESIASTICAL CORPORATIONS.

[*Authorities*.—Lind. *Prov.*; Gibs. *Codex*; Phillimore, *Eccl. Law*, 2nd ed.; Cripps, *Laws of the Church and Clergy*.]



**Perpetual Injunction.**—See INJUNCTION.

**Perpetuating (Perpetuation of) Testimony.**—

Where a person would become entitled upon the happening of any future event to any honour, title, dignity, or office, or to any estate or interest in any real or personal property, he may wish to perpetuate the testimony which may be material for establishing such right or claim, although he cannot bring an action to establish his right or claim till the happening of the event. In such cases an action to perpetuate testimony may be brought (see R. S. C. Order 37, rr. 35–38; and as to Ireland and Scotland, see 5 & 6 Vict. c. 69, repealed as to England by 46 & 47 Vict. c. 49, s. 3).

The action is commenced by writ, and the statement of claim must allege the plaintiff's and the defendant's supposed interests, that the matter cannot be made the subject of immediate judicial investigation, and that the evidence of the witnesses whose evidence it is proposed to take is material, and may be lost if not perpetuated.

No action to perpetuate testimony shall be set down for trial (Order 37, r. 38). The evidence is taken down in writing by an examiner, usually one of the examiners of the Court (*Marquis of Bute v. James*, 1886, 33 Ch. D. 157), and the witness may be cross-examined by the opposite parties. The evidence of witnesses abroad may be taken on commission (*Campbell v. A.-G.*, 1867, L. R. 2 Ch. 571).

The evidence having been taken, is filed; and when it is required, an order may be obtained for its use, if the witness is dead, or infirm, or cannot be compelled to attend at the trial (*Daniell's Chancery Practice*, 6th ed., p. 1514).

In all actions touching any honour, title, dignity, or office, or any other matter in which the Crown may have any estate or interest, the Attorney-General may be made a defendant; and if he has been, the evidence cannot afterwards be objected to on the ground that the Crown was not a party to the action in which the evidence was taken (Order 37, r. 36).

[*Authorities.*—See *Daniell's Chancery Practice*, pp. 1512–1515; *Story's Equity Jurisprudence*, ss. 1505–1512 and 1516.]

**Perpetuity; Perpetuities, Rule against.**—The rule against perpetuities makes void every estate or interest limited to arise upon the fulfilment of some condition precedent in any real or personal estate at law or in equity, unless the condition be such as must necessarily be fulfilled within twenty-one years after the death of some person, or the last survivor of some persons specified in the instrument containing the limitation, and living when the instrument first came into operation, or if no such person be specified; within twenty-one years from the time when the instrument first came into operation; provided that, if at the end of the period so defined there should be a child *en ventre sa mère*, who would, if born, be entitled under the limitation, the complete fulfilment of the condition may be suspended during the further period of gestation (*Cadell v. Palmer*, 1833, 7 Bli. N. S. 202; *Palmer v. Holford*, 4 Russ. 403; and see *Fearne, C. R.* 429, 430, note (*f*), 502, 9th ed.; 1 *Jarm. Wills*, 219–223, 230, 1st ed.; 213–216, 5th ed.; *Gray, Rule against Perpetuities*, s. 201, p. 144).

It has been already noticed (see CONTINGENT REMAINDERS, vol. iii. p. 321) that the simplicity of the early common law required every person intended to take an interest upon any transfer of property to be fully ascertained at



the time of the transfer; and that this rule originally applied to gifts of land in remainder as well as in possession, the early law only permitting the creation of future estates by way of vested remainder. The power of alienation therefore, which in this country was established from early times as an incident of ownership, could at first only be exercised in gifts or other transfers to living persons. The bounds so set to the exercise of the power of alienation were broken down—first, by the recognition of contingent remainders, which allowed of the gift of lands in remainder to unborn or unascertained persons, provided they should be born or ascertained when the particular estate came to an end; and secondly, by the rules applied in equity in enforcing the trusts imposed on persons to whom property was confided, with the intent that others should have the use of it. These rules allowed of the creation in equity, by will as well as by instrument operating *inter vivos*, of future estates or interests in the use of lands or chattels, of which the legal ownership was vested in trustees. As is well known, by the effect of the Statute of Uses (27 Hen. VIII. c. 10), equitable estates in the *use* of land were turned into legal estates, and estates in land limited to arise at a future time by way of shifting use became cognisable by the Courts of law. About the same time, too, the devise of lands by will was authorised by statute (32 Hen. VIII. c. 1; 34 & 35 Hen. VIII. c. 5); and this brought before the Courts the creation of future interests in land by way of executory devise. In interpreting such dispositions the Courts departed from the strict rules governing the conveyance of lands *inter vivos*, and adopted the more liberal doctrine as to the effect of wills, which had been already applied at law in construing wills of land devisable by custom and in equity in enforcing uses or trusts declared by will of lands put in feoffment to uses (Williams, *Real Prop.* 292, 315, 13th ed.; 352, 374, 18th ed.). With the firm establishment under the modern system of equity, which may be said to date from the restoration of Charles II., of the rules relating to trusts, a fresh opportunity was afforded of limiting interests to arise in the future with regard to personal as well as real estate placed in the legal ownership of trustees.

When contingent remainder, shifting use, executory devise, and declaration of trust all became available for the creation of future estates or interests which might be given to unborn or unascertained persons, and when it had been further established that executory interests, unlike contingent remainders, were indestructible, the judges perceived that the liberty of alienation, which in the early days of Bracton had been decidedly favoured by the Courts (Bract. 17 *a*, 45–47, 263 *b*; Pollock and Maitland, *Hist. Eng. Law*, i. 313, ii. 25, 26; Williams, *Real Prop.* 41–44, 13th ed.; 67, 69, 70, 90, 18th ed.), might be exercised to its own destruction. For if it were permissible to defer the vesting of interests pending the fulfilment of some condition, such as the birth of issue intended to take beneficially, for an unlimited time, the power of effectually alienating the property bestowed might obviously be indefinitely postponed; as those in whom the ownership was vested in the meantime could only convey to others an estate or interest liable to be defeated on the happening of the contingency on which some executory interest was to arise. This consideration brought the creation of executory interests at law or in equity within a general principle of policy, which had been already invoked by the Courts, after the barring of estates tail by common recovery had become established, as a ground for holding void any device to restrain a tenant in tail from suffering a recovery (1 Rep. 84 *a*, 88 *a*, 131 *b*; 6 Rep. 40 *a*; 10 Rep. 42 *b*; Cro. (2) 696–698). This was, that all contrivances shall be void which tend to



create a perpetuity, or to place property for ever out of reach of the exercise of the power of alienation (see *Cro.* (2) 590–593; 2 *Swans.* 460–468; 3 *Ch. Cas.* 17, 20, 25, 31–36; 12 *Mod. Ca.* 287; 2 *P. Wms.* 688).

Upon this principle it was considered that for an executory interest to be valid, the condition on which it was to take effect must be such as must necessarily be fulfilled within a limited space of time (*Fearne, C. R.* 430). It has already been shown how the exact definition of this limited space of time was gradually drawn by successive decisions extending over one hundred and fifty years—from *Howard v. Duke of Norfolk* in 1681, allowing the duration of existing lives, to *Cadell v. Palmer* in 1833, permitting the further term of twenty-one years (*CONTINGENT REMAINDERS, ante*, vol. iii. p. 325, where the decision in *Thellusson v. Woodford* should have been stated to be that any number of existing *lives* (not “heirs,” which is a misprint) may be taken). The question of the application of the rule to contingent remainders of legal estates has been discussed in the same place, and will not therefore be further noticed, except to say that, while the case of *In re Frost* (1890, 43 *Ch. D.* 236), there mentioned, justifies the general statement here given of the rule against perpetuities, it must not be forgotten that the limitation of contingent remainders is also subject to the rule laid down in *Whitby v. Mitchell*, 1889, 42 *Ch. D.* 494; 1890, 44 *Ch. D.* 85 (above, vol. iii. p. 326).

Here we must point out that, although the rule against perpetuities appears to be founded on the principle that the right of alienation shall not be exercisable to its own destruction in making such a disposition as shall render the property transferred inalienable in the hands of the transferee, the rule is none the less broken if an interest subject to a condition, which may not be fulfilled within the prescribed period, be given to an ascertained person capable of releasing the same (*Grey v. Montagu*, 2 *Eden*, 205; 3 *Bro. P. C.* 314; *In re Brown and Sibley's Contract*, 1876, 3 *Ch. D.* 156; *London and South-Western Rwy. Co. v. Gomm*, 1882, 20 *Ch. D.* 562, 573–575, 577, 581, 582, 586, 588). The reason of this is that the common law did not recognise either contingent remainders or executory interests as proprietary rights. They were said to be possibilities only, capable indeed of being released for the benefit of the freeholder, if given to ascertained persons, but otherwise inalienable (*Williams, Real Prop.* 279, 318, 13th ed.; 342, 376, 18th ed.; above, vol. iii. p. 328). Ascertained persons, to whom contingent interests had been limited, were not regarded by the law as owners invested with the right of alienation incident to ownership; those only who had the estate vested in them pending the fulfilment of the condition were the owners, and had the owner's right to alienate. It was their ownership that was disturbed, and their incidental right of alienation that was hindered, by the creation of indestructible executory interests; for while such interests existed, they, the only true owners, could not dispose of the property discharged from the possibilities attending the limitation of such interests. This appears to be the true reason why the limitation of executory interests is said to tend towards a perpetuity, and is void unless confined within the prescribed limits; and hence it is that an executory interest given to an ascertained person hinders the *owner's* alienation of the property as much as a similar interest limited to one unborn or otherwise unascertained (see 1 *Sand. Uses*, p. 196, 4th ed.; *Lewis on Perpetuity*, p. 164). It is true that there are certain judicial utterances in which this distinction has been obscured, and future or contingent interests have been pronounced to be without the mischief aimed at by the rule against perpetuities, if limited to an ascertained person capable of realising the same (*Gilbertson v. Richards*, 4 *H. & N.* 277, 297, 298; 5 *H. & N.* 453, 459;



*Avern v. Lloyd*, 1868, L. R. 5 Eq. 383; *Birmingham Canal Co. v. Cartwright*, 1879, 11 Ch. D. 421). The last case, however, was overruled in *L. & S.-W. Rwy. Co. v. Gomm*, *ubi supra*, in which the doctrine expressed in these *dicta* was emphatically repudiated. *Avern v. Lloyd* has also been expressly overruled (*In re Hargreaves*, 1890, 43 Ch. D. 401).

The weight of authority is now clearly in favour of the proposition that an executory or contingent interest, which transgresses the rule against perpetuities in the remoteness of the event in which it is to arise, is void, as well when limited to an ascertained as to an unascertained person (Williams on *Settlements*, 30–33; Gray, *Rule against Perpetuities*, ch. viii.).

The rule against perpetuities applies to dispositions of personal as well as real estate, whether made by instrument operating *inter vivos* or by will, and whether intended to take effect at law or in equity. The condition, on the fulfilment of which a future interest is to arise, is required to be such as must necessarily be fulfilled within the time allowed by the rule; otherwise the limitation of the interest is altogether void *ab initio*. If it be possible, when the instrument containing an executory limitation first takes effect, for the event, in which the interest given is to arise, to happen after the time allowed by the rule, the limitation is not made good, in case the event should in fact happen within the permitted period. Thus a gift by way of shifting use or executory devise or bequest to the first son of A., a bachelor, who shall attain the age of twenty-four years, is void for remoteness; and though A.'s first son should attain twenty-four in A.'s lifetime, he would take nothing under such a limitation. And limitations contravening the rule are not construed as conferring interests valid for the period allowed by the rule, and void only as to the time for which this period has been exceeded; they are treated as wholly void (*Leake v. Robinson*, 2 Mer. 363; 16 R. R. 168; 1 Jarm. *Wills*, 231–233, 1st ed.; 228, 229, 5th ed.). In limiting an interest subject to the rule, any number of existing lives may be taken, and they need not be the lives of persons entitled, or to become entitled under the instrument of disposition (*Thellusson v. Woodford*, *ubi supra*); the lives of the living issue of the Queen or the beneficed clergy might well be specified as those pending which the condition shall not be fulfilled. The term of twenty-one years which is allowed after the expiration of the last of any specified lives is an absolute term, and may be taken independently of the minority of any person beneficially interested; but the further period of gestation is only given in cases where gestation actually exists with regard to some child who, if born, would be entitled (*Cadell v. Palmer*, *ubi supra*). The permitted period is calculated from the time when the instrument containing the limitation first takes effect, that is to say, in the case of a deed from the date of its execution, but in that of a will from the testator's death. The nature of a will being such that it is only to take effect on death, there is imputed to a testator, in construing a will, knowledge of the circumstances existing at the time of his death. In consequence of this, executory bequests which would be void, if the testator had died immediately after making his will, may become valid through circumstances subsequently happening in his lifetime. Thus a bequest to the first son of A., who shall attain twenty-four, which, as we have seen, is void if A. has no son when the instrument takes effect, will be valid if A. die, leaving a son, during the testator's lifetime; for in such case the bequest must take effect, if at all, within the compass of a life in being at the testator's death, that is, the son's life. The bequest would also take effect if at the testator's death a son of A. had attained twenty-four, though A. were living (1 Jarm. *Wills*, 216, 217, 5th ed.; *Picken v. Matthews*, 1879, 10 Ch. D. 264).



"Where a gift is made to a class of persons, the whole class must be ascertained within the period limited, otherwise the whole gift will be void for remoteness. It is not enough that the minimum shares of some of the class are ascertained within the period. The share that each member of the class takes must be fixed and ascertained; and the Court cannot sever the minimum share of any member of the class from the rest of his share, holding the gift good as to the minimum share, and void beyond it. The entire gift fails if the uncertainty as to the amount of the several shares may exceed the limit fixed for the avoidance of perpetuities" (Williams on *Settlements*, 33, 34, citing *Smith v. Smith*, 1870, L. R. 5 Ch. 342; *Hale v. Hale*, 1876, 3 Ch. D. 643; *Bentwick v. Portland*, 1878, 7 Ch. D. 693; see also *Pearks v. Moseley*, 1880, 5 App. Cas. 714; 1 Jarm. *Wills*, 226 *et seq.*, 5th ed.).

The rule against perpetuities only affects dispositions creating an interest in property; it has no application to contracts as regards the personal obligation thereby created. A covenant, therefore, to do any act, as to pay money, is not avoided by reason that the time of performance may not arise within the period allowed by the rule (*Walsh v. Secretary of State for India*, 1863, 10 H. L. 367; *Witham v. Vane*, Appendix to Challis on *Real Property*). If, however, the contract create an equitable interest in property, it is a disposition affected by the rule; and the interest, which it purports to give, will be void, unless it must necessarily arise within the prescribed limits. This was established in the leading case of *L. & S.-W. Rwy. Co. v. Gomm*, 1882, 20 Ch. D. 562, in which the Court of Appeal refused specific performance of a covenant by a tenant in fee-simple of land purporting to give to the covenantee a right of purchasing the land at any time thereafter. This was decided on the ground that in equity a right of pre-emption is an interest in the land to be purchased, and the interest intended to be conferred by the covenant was void for want of conformity with the rule against perpetuities. Here we may note that covenants made by a tenant in fee-simple with some adjoining landowner, and imposing some restriction on the use of the covenantor's land—as not to build thereon—are not considered to be affected by the rule against perpetuities, by reason that in equity they impose a perpetual burden on the covenantor's land. They are regarded as conferring an immediate interest in equity in the nature of an easement (Knight-Bruce, V.C., *Ex parte Ralph*, De G. 219, 225; Jessel, M. R., *L. & S.-W. Rwy. Co. v. Gomm*, 20 Ch. D. 583; *Mackenzie v. Childers*, 1890, 43 Ch. D. 265, 279). If, however, the covenant did not impose an immediate restriction on the land, but sought to impose a restriction to commence at a time beyond the limits allowed by the rule against perpetuities, it seems that it would then be obnoxious to the rule, and therefore void. An exception to the doctrine that contracts creating an interest in property must observe the limits of the rule against perpetuities, appears to exist in the case of covenants to renew a lease, either perpetually or for certain terms (Jessel, M. R., *L. & S.-W. Rwy. Co. v. Gomm*, 20 Ch. D. 579; Challis, *Real Property*, 173, 174, 2nd ed., citing *Ross v. Worsop*, 1 Bro. P. C. 281; *Pendred v. Griffith*, *ibid.* 314; *Sweet v. Anderson*, 2 Bro. P. C. 256).

An exception to the rule against perpetuities is allowed in the case of executory limitations in defeasance of or immediately preceded by an estate tail. Such dispositions are allowed to be good, notwithstanding that the limits prescribed by the rule are necessarily exceeded, on the ground that, as such limitations are not indestructible, the law permitting them to be barred, formerly by recovery and now by disentailing deed, they are not within the mischief which the rule seeks to avert (Fearne, *C. R.* 423–428,



567, note, 9th ed.; *Heasman v. Pearce*, 1871, L. R. 7 Ch. 275; *Millbank v. Vane*, [1893] 3 Ch. 79). It is submitted that, for this reason amongst others, the rule in *Whitby v. Mitchell* (*ubi supra*), as to limitations by way of contingent remainder to the child of an unborn parent, does not apply to such limitations in remainder expectant on the determination of an estate tail.

Here we may note that the rule against perpetuities as applied to dispositions by way of shifting use, executory devise, or declaration of trust, contains no such restriction as was imposed in *Whitby v. Mitchell*, forbidding a gift of land to the child of an unborn person by way of a legal remainder after a life estate given to the unborn parent. It has been adjudged over and over again that executory limitations in favour of a living person's descendants or issue, in whatever degree, are good, if only the interests conferred on such descendants or issue must vest within the time allowed by the rule against perpetuities. In *Thellusson v. Woodford* (*ubi supra*) the gift held to be valid was to the eldest male lineal descendent living at the expiration of the specified lives of the testator's son. It is thus perfectly clear that the rule governing the creation of executory interests at law or in equity is unclouded by any such absurd condition as that there cannot be a possibility on a possibility, or that the possible children of unborn children are such as the law will not expect (see above, vol. iii. p. 326). And further, it does not appear that any such condition is attached to the limitation of a legal contingent remainder expectant on the determination of a vested estate. The earliest instance of a good contingent remainder is a limitation to one for life, remainder to the heir of J. S., a living person (above, vol. iii. p. 321). Here it is obviously possible that J. S. may be a bachelor when the limitation is made and die, leaving a grandson or even a great grandson as his heir, in the lifetime of the tenant for life. How, then, can it be maintained that the law refuses to recognise the children of the unborn as capable of taking under a limitation by way of contingent remainder, save, of course, in the exact instance defined in *Whitby v. Mitchell*?

The effect of the avoidance of dispositions transgressing the rule against perpetuities is that, if such dispositions are intended to abridge or defeat any prior limitations, those limitations will remain unaffected, and will confer unabridged or indefeasible interests accordingly (*In re Brown and Sibley's Contract*, 1876, 3 Ch. D. 156). And, as a rule, all limitations ulterior to or expectant on any limitation void for remoteness are also void (*Proctor v. Bishop of Bath and Wells*, 2 Black. H. 358; 1 Jarm. *Wills*, 253-255, 5th ed.). It is obvious that if an executory interest be given in some event, which is too remote, an interest limited to arise in case the former interest fail to take effect must be equally void for remoteness. If, however, there be a limitation void for remoteness, followed by a further limitation to take effect in one of several alternative events, and one of such events falls within the rule against perpetuities, although the others transgress it, the further limitation will not be void if the event conforming with the rule be that which happens (*Longhead v. Phelps*, 2 Black. W. 704; 1 Jarm. *Wills*, 255-259, 5th ed.). Thus if a bequest be made on trust for A. for life and after his death for all his children who shall attain twenty-five, and if A. shall not have any such children for B., and A. survive the testator but have no child of twenty-five at the testator's death, the bequest in favour of A.'s children is void, and so is that in favour of B. But if in the same circumstances the bequest were in trust for A. for life, and after his death for his children who should attain twenty-five, and if he should have no child, or if no child of his should attain twenty-five, for B., then the gift over



in B.'s favour might take effect if A. were to die without having had any child, though it would fail if A. had a child, but no child of his attained twenty-five.

It appears to be the better opinion that in the modern law the limitation of all such interests in land as the old common law allowed to be created *in futuro*, namely, rents, rights of entry for condition broken, terms of years, or rather the *interesse termini*, *profits à prendre*, and easements, is subject to the rule against perpetuities (1 Sand. *Uses*, 197-205, 4th ed.; Lewis, *Perp. Ch.* 29; Gray, *Perp.* ss. 299-303, 314-316). And it has been decided that a right of entry on land for condition broken in defeasance of an estate of freehold must be limited to arise within the time allowed by the rule against perpetuities, or it will be void (*Dunn v. Flood*, 1884, 25 Ch. D. 629; Gray, *Perp.* ss. 299-304, who cites a large body of American authorities to the effect that the law is otherwise in the United States, ss. 304-311). But the reservation by a lease of a right of entry to the lessor or his representatives on breach of covenant or condition by the lessee is not affected by the rule against perpetuities, the lessor's reversion being a vested estate, of which the falling into possession would be simply accelerated should the right reserved arise (Gray, *Perp.* s. 303). A power of entry limited on the creation by way of use of a rent charge in fee, and authorising the grantee, his heirs, and assigns in case of non-payment of the rent at any time to enter on the land charged, and hold the same till all arrears of the rent shall have been satisfied out of the profits, is also free from objection on the score of perpetuity, being considered to be no more than a part of the estate, which the granter has in his rent (*Havergill v. Hare*, Cro. (2) 510; Sug. Gilb. *Uses*, 178, 179; Lewis, *Perp.* 618). But a power for the grantee of a rent in fee to enter on the land charged, in case of non-payment of the rent at any time, and hold the same in fee, would appear to be void.

The rule against perpetuities must of course be observed in the limitation of powers of appointment, which can only be created at law by means of the Statute of Uses, or by way of executory devise, or in equity by declaration of trust. No power of appointment is therefore valid which is limited to arise in an event which may happen beyond the period prescribed by the rule (*Marlborough v. Godolphin*, 1 Eden, 404; *Hale v. Pew*, 25 Beav. 335; Sug. *Pow.* 31, 151, 8th ed.), unless the power be so given that it may be extinguished by barring an estate tail. On this ground it has been determined that a collateral power of sale and exchange contained in a settlement of land with the usual limitations is valid, although its exercise be not expressly restrained within the limits of the rule against perpetuities (*Waring v. Coventry*, 1833, 1 Myl. & K. 249; *Biddle v. Perkins*, 1832, 4 Sim. 135; *Briggs v. Earl of Oxford*, 1852, 1 De G., M. & G. 363; Sug. *Pow.* 848-851, 8th ed.). The rule must also be regarded in the exercise of powers of appointment. Here a difference must be noted between general powers authorising an appointment to any one, and special powers only authorising an appointment amongst a limited class of persons, such as the children of some specified parents. In exercising the former, the period, within which any contingent interests appointed must arise, is calculated from the time when the instrument exercising the power first takes effect; and this is the case even though the power were limited to be exercisable by will only (Sug. *Pow.* 394-396, 8th ed.; Williams, *Pers. Prop.* 326-328, 11th ed.; 354-356, 14th ed.; *Rous v. Jackson*, 1887, 29 Ch. D. 521; *In re Flower*, 1886, 55 L. J. Ch. 200; see, however, *In re Powell's Trusts* (39 L. J. Ch. 188), which was not followed in the two last-mentioned cases, but which Mr. Gray (*Perp.* s. 526) maintains



to be in accordance with principle. There is no doubt that to hold that, in the exercise of a power of appointment by will only, the period allowed for the creation of contingent interests commences from the death of the donee of the power, has the practical result of increasing the period, during which the property given may be tied up, by the life of the donee of the power). But in the case of special powers, the time allowed by the rule against perpetuities is reckoned from the date of the instrument *creating* the power, not from the time when the instrument exercising the power takes effect. In exercising any special power, therefore, care must be taken that any estate or interest appointed would have been unobjectionable on the score of perpetuity if limited by the instrument which created the power (*Co. Litt.* 271 *b*, *n.* (1), vii. 2; *Routledge v. Dorril*, 2 Ves. Jun. 357; *Sug. Pow.* 396, 8th ed.; Williams on *Settlements*, 43; *Whitby v. Mitchell*, *ubi supra*). Here we may observe that a power of appointment amongst a limited class of persons, some of whom might be born beyond the prescribed period, is not void, if authorising an exclusive appointment, by reason only that it is not expressly confined to those only of the class who shall be born within that period. Thus a power for a given person to appoint to all or any of his issue is not void; but it can only be well exercised in favour of such of his issue as shall be born within the time allowed by the rule against perpetuities, reckoning from the date of the instrument which created the power (*Hockley v. Mawbey*, 1 Ves. Jun. 143, 150; 1 R. R. 93; *Routledge v. Dorril*, *ubi supra*; *Griffith v. Pownall*, 1843, 13 Sim. 393; *Attenborough v. Attenborough*, 1855, 1 Kay & J. 296; *Sug. Pow.* 397, 8th ed.). Limitations in default of appointment under a power which is void for remoteness are not void, unless they themselves break the rule against perpetuities (*In re Abbott*, [1893] 1 Ch. 54).

The rule against perpetuities does not prohibit the alienation of land to or for the benefit of a corporation into mortmain, or for charitable purposes, though perpetual, and such alienation may be made under the conditions imposed by the Mortmain and Charitable Uses Acts, 1888 and 1891, replacing the earlier statutes. If, however, the gift to a corporation or for charitable purposes be not immediate, but is to take effect subject to the fulfilment of some condition precedent at a future time, the rule against perpetuities will apply, and the condition must be fulfilled within the period thereby allowed (*Commissioners of Charitable Donations v. De Clifford*, 1 Dr. & War. 245, 254; *Chamberlayne v. Brockett*, 1873, L. R. 8 Ch. 206, 211; *In re Roberts*, 1882, 19 Ch. D. 520; *In re White's Trusts*, 1886, 33 Ch. D. 449, 453). As property may be lawfully given to be for ever devoted to charitable purposes, it has been held that property may be well limited to one charity subject to a gift over in favour of another charity, to arise in some event which may take place beyond the period allowed by the rule against perpetuities (*Christ's Hospital v. Grainger*, 1848, 1 Mac. & G. 460; *In re Tyler*, [1891] 3 Ch. 252). But if property be given for charitable purposes with a gift over on the happening of some future event, in favour of a private individual, the gift over, to be valid, must conform with the rule (*In re Bowen*, [1893] 2 Ch. 491).

The rule against perpetuities is subject to certain statutory modifications. First, executory limitations contained in instruments coming into operation after the year 1882 are subject to a further restriction imposed by the Conveyancing Act, 1882 (Stat. 45 & 46 Vict. c. 39, s. 10), in which it is enacted that, where there is a person entitled to lands for an estate in fee, or for a term of years absolute or determinable on life, or for a term of life, with an executory limitation over on default or failure of all or any of his



issue, whether within or at any specified period of time or not, that executory limitation shall be or become void and incapable of taking effect, if and as soon as there is living any issue, who has attained the age of twenty-one years, of the class on default or failure whereof the limitation over was to take effect. Secondly, dispositions directing the accumulation of the income of any property are subject to statutory restrictions. Stat. 39 & 40 Geo. III. c. 98 (commonly called the Thellusson Act, having passed in consequence of the extraordinary will of Mr. Thellusson, held valid in *Thellusson v. Woodford*, *ubi supra*) forbids the accumulation of income for any longer term than the life of the grantor or settlor, or twenty-one years from the death of any such grantor, settlor, deviser, or testator, or during the minority of any person living or in *ventre sa mère* at the death of the grantor, deviser, or testator, or during the minority only of any person who, under the settlement or will, would for the time being, if of full age, be entitled to the income directed so to be accumulated (see *Wilson v. Wilson*, 1851, 1 Sim. N. S. 288). But the Act does not extend to any provision for payment of debts, or for raising portions for children (see *Halford v. Stains*, 1849, 16 Sim. 488, 496; *Bacon v. Procter*, Turn. & R. 31; *Bateman v. Hodgkin*, 1847, 10 Beav. 426; *Barrington v. Liddell*, 1852, 2 De G., M. & G. 480), or to any direction touching the produce of timber or wood. Nor does it apply to a trust to expend part of the income of a landed estate in maintaining the property in good repair (*Vines v. Raleigh*, [1891] 2 Ch. 13). Any direction to accumulate income, which may exceed the period thus allowed, is valid to the extent of the time allowed by the Act, but void so far as this time may be exceeded (see 1 Jarm. *Wills*, 275, 5th ed.; *In re Lady Rosslyn's Trust*, 1848, 16 Sim. 391; *Ralph v. Carrick*, 1877, 5 Ch. D. 984, 997, 998). And if the direction to accumulate should exceed the limits allowed by the rule against perpetuities, it will be void altogether, independently of the above Act (see *Southampton v. Hertford*, 1813, 2 Ves. & Bea. 54; 13 R. R. 18; *Ker v. Dungannon*, 1 Dr. & War. 509; *Curtis v. Lukin*, 1842, 5 Beav. 147; *Broughton v. James*, 1839, 1 Coll. 26; *Scarisbrick v. Skelmersdale*, 1850, 17 Sim. 187; *Turvin v. Newcome*, 1856, 3 Kay & J. 16). A trust for accumulation for the benefit of a charity may not exceed the limits imposed by the Thellusson Act (*Harbin v. Masterman*, 1871, L. R. 12 Eq. 559). By an Act of 1892 (Stat. 55 & 56 Vict. c. 58) the accumulation of income for the purchase of land is prohibited for any longer period than during the minority or respective minorities of any person or persons who, under the instrument directing accumulation, would, for the time being, if of full age, be entitled to receive the income so directed to be accumulated.

[*Authorities*.—Fearne, *Cont. Remrs.*; 1 Jarm. *Wills*; Lewis on *Perpetuity*; Marsden on *Perpetuity*; Gray, *Rule against Perpetuities*, Boston, U.S.A., 1886.]

**Per proc.**—See PROCURATION.

**Perquisitio**—Something gained or acquired by the holder of an office over and above the wages or salary attached to such office. *Perquisitio*, and its equivalent, “purchase,” is also used in contradistinction to descent, or title derived from the ancestor; and the heir was said to take by “purchase” instead of by “descent,” to denote that he took his estate by virtue of the original grant to the ancestor and himself, and not by devolution of the estate on the ancestor’s death.



In connection with copyholds, perquisites of the lord are those advantages and profits which accrue to him over and above the yearly profits and income, and the term is used to include fines, escheats, heriots, reliefs, wards, and the like.

**Perquisition.**—See WAR.

**Per quod consortium amisit.**—See SEDUCTION.

**Per quod servitium amisit.**—See SEDUCTION.

**Person.**—It is provided by sec. 2 of the Interpretation Act, 1889 (51 & 52 Vict. c. 43), that in the construction of every enactment relating to an offence punishable on indictment or on summary conviction, the expression “person,” whether contained in an Act passed before or after the commencement of the Act of 1889, shall, unless a contrary intention appears, include a body corporate; and by sec. 19, that in the Act of 1889, and in every Act passed subsequently thereto, the expression “person” shall, unless a contrary intention appears, include any body of persons, corporate or unincorporate. Subject to these provisions, the question whether the word “person” in a statute is to be interpreted as including a corporation depends upon the context and the object of the statute. *Primâ facie*, it does include a corporation; but in its popular sense and ordinary use it does not, and statutes are often conceived according to the popular use of language; and whenever the object of the statute requires that the word shall be interpreted in its more or less extended sense, it must be construed accordingly (per Selborne, L.C., and Lord Blackburn, in *Pharmaceutical Society v. London, etc., Supply Association*, 1880, 5 App. Cas. 857). In *Boyd v. London, etc., Rwy. Co.* (1838, 4 Bing. N. C. 669), where the special Act incorporating a railway company provided that no action should be brought against any person for anything done in pursuance of the Act, until after twenty-one days’ notice to the intended defendant, it was held that the word “person” included the railway company; and a similar construction was adopted in *St. Helen’s Tramway Co. v. Wood*, 1892, 56 J. P. 71, where a tramway Act imposed a penalty on “any person” offending against its provisions. So a joint-stock company is a person within the meaning of sec. 11 of the Act of 54 Geo. III. c. 159 (*United Alkali Co. v. Simpson*, [1894] 2 Q. B. 116). On the other hand, it has been held that a corporation cannot sue for penalties as a common informer under a statute empowering the “person or persons” who shall inform and sue for the penalties to recover the same (*St. Leonard’s, Shoreditch v. Franklin*, 1878, 3 C. P. D. 377).

In *In re Jeffcock* (1882, 51 L. J. Ch. 507) it was held that a power given to trustees to grant leases “to any person or persons they should think fit,” authorised them to grant a lease to a limited company.

See AGGRIEVED.

**Persona.**—This word, in Latin, originally signified a mask, whence its use in the phrase *dramatis personæ*, but in Roman law it meant *homo cum statu*, that is to say, a human being viewed as clothed with legal rights



and as capable of having and becoming subject to these. The word was also used in a more restricted sense with reference to the different relationships to which the same individual might in law subject himself, in which case such a one might be regarded as possessing several *personæ* or characters, as of husband, father, master, etc. So the *jus personarum* is that portion of the general law which deals with such relationships. The phrase *jus in personam*, again, was used in the later civil law to signify a mere right of action, as distinguished from such rights as of hypothec, which were called *jura in rem*.

As above stated, in its wider sense, *persona* meant *homo cum statu*, and status might either be *naturalis*, implying physical capacity, or *civilis*, involving *libertas*, *civitas*, and *familia*, and implying such qualities as rank, domicile, relationship, profession, etc. As to the latter, liberty was essential; wherefore slaves, strictly speaking, had no status. As to the former, the Romans regarded even the babe in the womb as for some purposes a *persona*. Thus capital punishment was prohibited against pregnant women, and a woman bringing about abortion was guilty of murder. But for purposes of inheritance a child had to be born alive, in proof of which any sure sign was regarded by Justinian as sufficient. See PERSON.

**Person Aggrieved.**—See AGGRIEVED.

**Persona designata.**—Where a person is indicated in a statute or legal instrument not by name, but either by an official designation or as one of a class, a question sometimes arises whether he ceases to be the person so indicated on losing his official designation or his character as one of the class, or whether the intention was to single him out as a *persona designata*, that is, as an individual, the designation being merely a further description of him. *Designatio personæ* then, in general, means simply the singling out by description of a party to a deed or contract; or a person taking thereunder, such party or person being in turn called *persona designata*. When difficulty is found in ascertaining whether a person takes as *persona designata*, the maxim "*Designatio unius est exclusio alterius et expressum facit cessare tacitum*" is applicable; in other words, if one person is specified, another is excluded, on the principle that what is expressed makes what is only understood to give way. Thus where a testatrix created a trust in favour of all the nephews and nieces of her late husband living at the time of his death, except A. and B., as tenants in common, and two nephews who survived her husband had since died, it was held that the gift was to a class, and not to *personæ designatæ*, and that consequently there was no lapse, and the fund was divisible among those who survived (*Dimond v. Bostock*, 1875, L. R. 10 Ch. 358; cp. *In re Jackson, Shiers v. Ashworth*, 1883, 25 Ch. D. 162; *In re Stanhope's Trusts*, 1859, 27 Beav. 201). On the other hand, a gift of the residue "equally to and between all my children," following upon a bequest to "my nine children," was held to indicate *personæ designatæ*, so as to entitle the representatives of a child who died in the testator's lifetime to participate (*In re Stansfield, Stansfield v. Stansfield*, 1880, 15 Ch. D. 84). So, though in general a bequest to "children" will mean those within that description at the testator's death, even including one *en ventre sa mère*, if it is clear that only those in existence at the date of the instrument were intended, such intention will be effectuated (*Rogers v. Mutch*, 1878, 10



Ch. D. 25; *Pearce v. Carrington*, 1873, L. R. 8 Ch. 969; *Doe d. Clarke v. Clarke*, 1795, 2 Black. H. 399; *Sherer v. Bishop*, 1792, 4 Bro. C. C. 55; *Viner v. Francis*, 1789, 2 Cox, 190). The word "children," however, will not, *primâ facie*, include illegitimate children (*Megson v. Hindle*, 1880, 15 Ch. D. 198; *In re Wells' Estate*, 1868, L. R. 6 Eq. 599), and never future illegitimate children (*Pratt v. Mathew*, 1856, 22 Beav. 328; *Beachcroft v. Beachcroft*, 1816, 1 Madd. 430); but an illegitimate child *in esse* may take under a gift to children as a class, if it clearly appears that such was the intention (*Holt v. Sindrey*, 1868, L. R. 7 Eq. 170). In the same way, where the intention is established, a woman, though not lawfully married, may take under the designation "wife" (*Lepine v. Bean*, 1870, L. R. 10 Eq. 160; *In re Petts*, 1859, 27 Beav. 576; *Doe d. Gains v. Rouse*, 1848, 5 C. B. 422; *Giles v. Giles*, 1836, 1 Keen, 685). But if technical words are employed, they will receive their technical signification (*Roddy v. Fitzgerald*, 1857, 6 H. L. 823; *Jesson v. Wright*, 1820, 2 Bli. 1); for example, the term "executors and administrators" will be construed strictly, and not as a *designatio personæ* for next-of-kin, and the term "beneficiary" will also receive its ordinary signification (see *Webb v. Sadler*, 1873, L. R. 8 Ch. 419; *Owen v. L. & N.-W. Ry. Co.*, 1867, L. R. 3 Q. B. 54; and see as to the term "heir," *De Beauvoir v. De Beauvoir*, 1852, 3 H. L. 524). So a gift to "Her Majesty's Government" was directed to be disposed of under the royal sign-manual (*Newland v. A.-G.*, 1809, 3 Mer. 684), and the Attorney-General was held not to be a "person claiming some estate sought to be recovered" within 3 & 4 Will. iv. (1833), c. 27 (*A.-G. v. Magdalen College*, 1854, 23 L. J. Ch. 844). Of course, if a character has been falsely and fraudulently assumed, a bequest to one in that character will not be enforceable (*Wilkinson v. Joughin*, 1866, L. R. 2 Eq. 319); but if there has been no fraud, though there is a mistake in the character, it will be good (*In re Petts, supra*; *Rishton v. Cobb*, 1839, 9 Sim. 615).

See also NEPHEWS AND NIECES; NEXT-OF-KIN.

**Personal Act.**—*Note*—In this article the Standing Orders of the House of Lords are cited as L. S. O., and those of the House of Commons as C. S. O.

The term "personal Act" is applied to all estate, divorce, naturalisation, and name Acts, and all other private Acts which are not designated by the Standing Orders of the House of Lords as local Acts (L. S. O. 149). Personal Bills are nearly always originated in the House of Lords, and, except in the case of Bills for the restoration of honours and lands, and for restitution in blood, the proceedings in relation thereto in that House are governed by the Standing Orders, 150 to 181. Bills for the restoration of honours or lands, or for restitution in blood, are signed by the Queen, and presented to the House of Lords by her command, and then pass through the ordinary stages of public Bills (May's *Parl. Prac.* 809, 810). Any other personal Bill must be brought into the House of Lords on a petition for leave to bring it in, with a printed copy of the Bill annexed to the petition, and one or more of the parties principally concerned must sign the petition; and a copy of the Bill must be delivered to every party concerned before the second reading thereof (L. S. O. 150–152).

Petitions for estate Bills must, on presentation, be referred to two judges of the High Court in England, or of the Court of Session in Scotland; and no such Bill may be proceeded with until a copy of the petition, with the report of the judges thereon, has been delivered to the Chairman of



Committees (L. S. O. 153–157). As to the proceedings of committees on estate Bills, see L. S. O. 158–174; C. S. O. 188 *b*.

Divorce Acts are generally applied for by persons domiciled in Ireland, where a divorce *a mensâ et thoro* can be obtained, but not a dissolution of marriage enabling the parties to marry again. No petition for a divorce Bill may be presented in the House of Lords until an official copy of the proceedings in the Court for matrimonial causes at the place of domicile or residence, at the suit of the party desiring to present the petition, has been delivered on oath at the Bar of the House; and no divorce Bill to dissolve a marriage for adultery, and to enable the petitioner to marry again, will be received unless a provision is inserted prohibiting the guilty parties from intermarrying (L. S. O. 175, 176). The petitioner must attend on the second reading of any such Bill, in order that he may be examined, if the House thinks fit, at the Bar of the House (L. S. O. 178; and see C. S. O. 189–192); and counsel will be heard and witnesses examined in support of the Bill, whether there are any opposing petitions or not (May's *Parl. Prac.* 813).

Before any naturalisation Bill is read a second time, the petitioner must produce a certificate from one of the Secretaries of State respecting his conduct, and must take the oath of allegiance at the Bar of the House; and the consent of the Crown to the Bill must be previously signified (L. S. O. 179, 180).

Personal Bills sent down to the House of Commons are, generally speaking, subject to the same rules, and pass through the same stages, as other private Acts (May, 813–815), as to which see PRIVATE BILL LEGISLATION.

It is not usual for personal Acts to be printed by the Queen's printers. A personal Act which is not so printed may be proved by an examined copy. See also LOCAL ACT.

**Personal Action.**—See ACTIONS; ACTIO PERSONALIS MORITUR CUM PERSONÂ.

**Personal Chattels.**—See CHATTELS; PERSONAL PROPERTY; and BILLS OF SALE, vol. ii. at p. 128.

**Personal Estate.**—See PERSONAL PROPERTY.

**Personal Identity.**—See IDENTITY; MEDICAL JURISPRUDENCE, vol. viii. at p. 314.

**Personal Ornaments.**—It was held in *Willis v. Curtois* (1838, 1 Beav. 196) that a pocket-book and a case of physician's instruments were not personal ornaments; and as to other articles, such as pencil-cases, eye-glasses, etc., the Court expressed the opinion that they come under the definition of ornaments, even though capable of being put to practical use. It is usual to include personal ornaments in a bequest of household furniture and effects, etc., and they are also generally excluded from the covenant in a marriage settlement, that future and after-acquired property shall be settled.



**Personal Property.**—The main division of property by the English law is into real and personal, and the word “property,” for the purposes of this division, and generally, is susceptible of two distinct meanings, namely, things the subject of rights, and rights in relation to things. The two leading senses of the word have recently been given as—(1) “the thing to which a person stands in a certain relation;” (2) “the relation in which the person stands to the thing” (per Chitty, L.J. (then J.), *In re Earnshaw-Wall*, [1894] 3 Ch. 156). But this division is not the earliest. The earliest was into lands, tenements, and hereditaments on the one hand, goods and chattels on the other; goods and chattels which are synonymous, including these interests of later origin in land, such as terms of years, wardships, estate by elegit, which in the thirteenth century were classed as chattels real—“real” inasmuch as though not recognised as realty, they “savoured of the realty” (see Pollock and Maitland’s *History of English Law*, vol. ii. 115 *et seq.*; and see for further details, CHATTELS).

The origin and reason of the division into real and personal is (to deal with the matter very shortly) due to the respective remedies of the dispossessed owner in each case. The owner dispossessed of land had an *actio in rem*, or *real action*, that is to say, might sue for specific recovery of the land itself, and his remedy was against the thing itself of which he had been deprived; but the owner of a chattel, if deprived of it, had an *actio in personam*, or personal action only, that is to say, could sue only for damages in respect thereof, his remedy being against the person who had deprived him of it, not against the thing itself, which he could not specifically recover (cp. *Co. Litt.* 118 *b*). The older writers suggest as an alternative reason for the name “personal property” the fact that such property “belongs for the most part to the person of a man” (*Co. Litt. loc. cit.*), or consists “of things moveable which may attend a man’s person wherever he goes” (2 Black. *Com.* 884). Whether we accept or reject this latter derivation, there is little doubt that this class of property was looked upon as a transient and perishable commodity held in little esteem by our early legislators, who devoted all their care to the more permanent immoveables like lands, houses, and their profits. Accordingly, of real property they took, says Blackstone, “all care in ascertaining the right and directing the disposition,” . . . imagining it to be lasting, and such as . . . “would answer to posterity the trouble and pains that their ancestors employed therein; but at the same time entertained a very low and contemptuous opinion of personal estate.” It is for this reason, that whereas we find that the feudal laws had in quite early times laid the foundations of a great and complex system for regulating the holding, disposition, and incidents of land, the laws with regard to personalty were simple and few, and it was not until the Middle Ages that the civil law was adapted to some extent to meet the requirements of a class of property which, though unimportant and small at first, had increased and developed concurrently with the commerce of the country. It is difficult now to realise how trifling and unimportant was the amount of personal property in feudal times, without bearing in mind the “scarcity of money and the ignorance of luxurious refinements” then prevailing, and whether or not personalty was held in little esteem by the early legislators, its scarcity undoubtedly at the time justified disregard of it. “The Real Property Law of England had its origin at a time when land and its rents and profits constituted nearly the whole tangible wealth of the country.”<sup>1</sup>

Property is also divided into moveables and immoveables: moveables

<sup>1</sup> Cp. the very first words of Challis, *R. P.*



comprising all personal property except chattels real; immoveables, all real property, and also chattels real. The classification is of importance for the purpose of noting that the rule *mobilia sequuntur personam* does not apply to chattels real, and accordingly, as regards the conflict of laws, their devolution on the owner's death is governed by the *lex loci rei sitæ*, not by the law of the domicile of such owner. See LEASE; LEASEHOLD.

In the same way as the primary rule as regards ownership of real property is that the English law does not recognise any absolute ownership, but only an estate or interest therein (see ESTATES), so the converse is the cardinal rule as to personal property. The law recognises in it no estate or partial interest, but only absolute ownership, and there is no way in which successive interests can be carved out in personalty except by the interposition of trustees, who, having the full legal ownership, may hold the property upon the successive beneficial trusts declared by the settlement or will. Without such interposition the law gives the absolute ownership to the first taker. There is but one exception to this rule in favour of certain successive interests in personalty given by will. These are called executory bequests, and the law thereon will be found under EXECUTORY INTERESTS.

Personal property has been subdivided by many writers into corporeal and incorporeal; corporeal chattels being tangible things having actual existence, incorporeal chattels being intangible things such as exist in contemplation only (*e.g.* a right of action).

This classification, borrowed from the Roman law, has been objected to as unscientific, in that it contrasts things, the subject of rights with the rights themselves. Disregarding this, therefore, we may notice the more important and universally recognised subdivision of personalty into *choses in possession* and *choses in action*. CHOSSES IN POSSESSION are such tangible and personal chattels of which the owner has possession, actual or constructive, and possession in this sense includes not only absolute, but qualified possession, as in the case of animals *feræ naturæ*, in which case the nature of the thing itself precludes the idea of absolute ownership, or the qualified ownership of a bailee where the ownership is not permanent and may be defeated. Choses in possession formed of course far the greater part of personal property in early times. CHOSSES IN ACTION included originally such things the possession of which could not be recovered without an action, the right of action being contrasted with the actual right of possession. "All property *in action*," says Blackstone, "depends entirely upon contract, either express or implied" (2 Black. Com. 397). Undoubtedly the right extended to damages for tort, and in "modern times lawyers have accurately or inaccurately used the phrase 'choses in action' as including all personal chattels that are not in possession" (Blackburn, L.J., in *Colonial Bank v. Whinney*, 1886, 11 App. Cas. 426), so that the phrase embraces not only the equitable choses in action, such as legacies, introduced by equity, but the large class of property unknown to the common law, such as consols, shares, and other modern investments, patents, copyright, and literary and scientific property. For details as to choses in possession and choses in action and the distinctions between them as to assignment and otherwise, see CHOSSES IN ACTION; CHOSSES IN POSSESSION; ASSIGNMENTS OF CHOSSES IN ACTION.

Property in, the sense of a right to things, may be either qualified or absolute: it has already been noticed that as regards animals *feræ naturæ* one cannot have absolute property; such property being restricted to inanimate things or tame and domestic animals. But a qualified property



may subsist in animals *feræ naturæ*, thereby making such animals personal property. It may be acquired by—(1) reclaiming and taming such animals, *i.e.* by industry; or (2) by confining them within the lands of the qualified owner; or in the case of young (3) “*propter impotentiam*,” *i.e.* on account of their inability to fly away; or, lastly, by privilege, whereby the qualified owner may, to the exclusion of others, take and kill such animals within certain parts. As to this right of killing and taking game, see GAME LAWS.

Besides the incidents that distinguished personal from real property as regards the dispossessed owner's right of action and the limitation of successive interests, we may notice for the purpose of cross-reference the other marked differences as regards alienation and devolution. The neglect of personal property by the law in early days saved it from the restrictions on alienation both *inter vivos* and by will to which realty was subjected; this difference, as well as the difference in the mode of alienation, will be found treated of under CHATTELS; and the subject of involuntary alienation (*i.e.* for debt, etc.) of personal property under CHATTELS; EXECUTION. With regard to devolution on intestacy, the rules by which such devolution was regulated were those of the civil law, differing entirely from the rules regulating the descent on intestacy of realty. See DISTRIBUTION, STATUTES OF.

There are, however, certain chattels which descend, according to the laws of realty, to the heir instead of passing to the executor or administrator. The most important of these exceptions are title-deeds, heir-looms, fixtures, vegetables, and animals *feræ naturæ* (see the corresponding titles, and Wms. *R. P.* pt. I. ch. i. “Of chattels which descend to the heir”).

Personal property admits of the same classification with regard to the number and connection of its owners as does real estate (see ESTATES), that is to say, it may belong to a person or persons—

1. In severalty (there being but one owner);
2. As joint-tenants;
3. As tenants in common.

Joint-tenancy and tenancy in common may be classed together as “co-ownership.”

**Personal Representatives.**—See EXECUTORS AND ADMINISTRATORS; LEGAL REPRESENTATIVES; REAL REPRESENTATIVE.

**Personal Rights.**—See IN PERSONAM; and cp. IN REM.

**Personal Tithes.**—See TITHES.

**Personalty.**—See PERSONAL PROPERTY.

**Personation.**—1. *Personation of electors* is dealt with under CORRUPT PRACTICES.

2. *Personation of Bail.*—It is a felony under sec. 34 of the Forgery Act, 1861, to acknowledge, in the name of another, without lawful authority,



any recognisance of bail, *cognovit actionem* or judgment, deed, or instrument, before any Court, judge, or person lawfully authorised.

3. There are numerous other cases in which personation of another is criminally punishable. At common law it is at most a cheat or fraud (see CHEAT; FALSE PRETENCES); but it is dealt with in many statutes in connection with FORGERY and like offences.

*Personation of sailors*, in order to receive pay, pension, or prize-money, is a misdemeanour punishable summarily or on indictment under the Admiralty Powers Act, 1865 (28 & 29 Vict. c. 124, ss. 8, 9).

*Personation of soldiers*, or men in the reserve or auxiliary forces, or their relatives, with like intent, is punishable under the Chelsea Hospital Act, 7 Geo. IV. c. 16, ss. 35, 38 (felony—life), and 2 & 3 Will. IV. c. 53, s. 49 (felony—life), and sec. 142 of the Army Act (44 & 45 Vict. c. 58) (misdemeanour); and personation of an officer or soldier to obtain a billet, by sec. 121 of the latter Act.

Personation to obtain a *police pension* is punished by 53 & 54 Vict. c. 45, s. 9.

*Personation of owners of Stock and Shares* is felony in the cases of—

(1) Any share or interest in any stock, etc., transferable at the banks of England or Ireland, or in the capital stock of any body corporate, company, or society established by charter or statute, or of dividends in respect thereof (24 & 25 Vict. c. 98, s. 3);

(2) India stock (26 & 27 Vict. c. 73, s. 14);

(3) Shares and interests in joint-stock companies and companies, and share warrants (30 & 31 Vict. c. 131, s. 35);

(4) National debt stock certificates (33 & 34 Vict. c. 67, s. 3); and

(5) Colonial stock certificates (40 & 41 Vict. c. 59, s. 31).

All these offences are punishable by penal servitude for life, or not less than three years, or by imprisonment for not over two years.

By the *False Personation Act*, 1874 (37 & 38 Vict. c. 36), passed in consequence of the Tichborne trial, it is felony falsely and deceitfully to personate any person as the heir, executor, or administrator, wife, widow, next-of-kin, or relative, with intent fraudulently to obtain any land, estate, chattel, money, valuable security, or property. It is punishable by penal servitude from three to five years, or imprisonment for not over two years, with or without hard labour (s. 1).

The enactment does not affect the alternative remedies for perjury, forgery, or other offences in connection with the personation (s. 2). The offence is not triable at Quarter Sessions.

As to personation of a husband, see RAPE.

There are also minor provisions punishing personation of emigration agents (57 & 58 Vict. c. 60, s. 354); police officers (2 & 3 Vict. c. 47, s. 17, London; 2 & 3 Vict. c. 93, s. 15, county; 10 & 11 Vict. c. 89, s. 12, towns); factory officials (41 & 42 Vict. c. 16, s. 85); and masters (32 Geo. III. c. 56).

**Person of Unsound Mind.**—See LUNACY.

**Per stirpes.**—See PER CAPITA.

**Perversity.**—See NEW TRIAL; VERDICT.



**Petition.**—*Generally.*—A petition is an application made in a summary way to the Court, based upon a written statement of the facts leading up to the relief sought, and differing in that respect from a motion (see MOTION).

Except with regard to petitions of right (a subject which is treated separately, see PETITION OF RIGHT), the jurisdiction by petition is practically unknown in the Queen's Bench Division. The only instances of petitions given in Chitty's *Archbold's Practice* are petitions addressed to the Lord Chief-Justice to assign a guardian to a defendant of unsound mind, and for leave to sue *in formâ pauperis*. Petitions in bankruptcy, divorce, and lunacy have been dealt with under those respective titles in other volumes of this work, whilst petitions of appeal to the House of Lords have been treated under the head of APPEALS. This article, therefore, will be confined to petitions in the Chancery Division.

The jurisdiction of the High Court by petition is preserved by the rules under the Supreme Court of Judicature Acts (R. S. C. 1883, Order 1, r. 2).

By the express terms of sec. 100 of the Judicature Act, 1883 (36 & 37 Vict. c. 66), a petition is a pleading, and is subject therefore to the provisions of the rules of Court with regard to pleadings.

*Petitions of various kinds.*—A petition may either be presented in a pending action or matter, or may itself be the originating proceeding.

A petition may be either—(1) of course, or (2) special.

*Petitions of Course.*—An order of course is described as an order made on an *ex parte* application, to which a party is entitled as of right on his own statement and at his own risk (R. S. C. 1883, Appendix N. No. 195).

Orders made on petitions of course were formerly drawn up, passed, and entered in the office of the Secretaries of the Master of the Rolls, but are now drawn up, passed, and entered by or under the directions of the registrars of the Chancery Division (Order 62, r. 18).

Notwithstanding the provisions of R. S. C., May 1887, with regard to the district registrars in Liverpool and Manchester, such district registrars have no jurisdiction to grant orders of course to tax a solicitor's bill, though possibly they may have power to make orders of course simply relating to procedure in matters assigned to them (*In re Porrett*, [1891] 2 Ch. 433).

It is of great importance that the utmost good faith should be kept with the Court upon an application for an order of course. If the order be obtained irregularly, or on the suppression or misrepresentation of material facts, it will be discharged (*Victor v. Devereux*, 1843, 6 Beav. 584; *Hertford v. Suisse*, 1844, 7 Beav. 160; *Holcombe v. Antrobus*, 1845, 8 Beav. 455; *De Feuchères v. Dawes*, 1843, 11 Beav. 46; *Wyllie v. Ellice*, 1848, 11 Beav. 105; *In re Winterbottom*, 1851, 15 Beav. 80; *Bidder v. Bridges*, 1884, 26 Ch. D. 1); and that without regard to the merits of the case (*Harris v. Start*, 1838, 4 Myl. & Cr. 261; *Brookes v. Purton*, 1841, 4 Beav. 494). "There are few things more important than that parties who apply for an order of course should fairly state all the circumstances" (per Lord Langdale, M. R., *Victor v. Devereux*, 1843, 6 Beav. 584).

An order of course ought to be served as soon as possible, otherwise it will not affect any step regularly taken by the opposite party before service of the order (*Church v. Marsh*, 1843, 2 Hare, 652).

After service an order of course cannot be amended and re-served (*Wool v. Townley*, 1845, 9 Beav. 41).

It is not possible to enumerate all the cases in which orders can be obtained on petitions of course. A very familiar example of such an



order made on an originating proceeding is furnished by what is known as the common order to tax a solicitor's bill (see as to this, *In re Pollard*, 1888, 20 Q. B. D. 655), whilst an order to carry on proceedings under R. S. C. 1883, Order 17, may be cited as an instance of such an order made in the course of the ordinary proceedings in a pending action.

*Special Petitions.*—It has been said that a petition is the appropriate mode of applying to the Court in a pending matter, where a long and intricate statement is necessary to put the Court in possession of all the facts of the case (*Shipbrooke v. Hinchinbrook*, 1807, 13 Ves. 393), or where the order sought is in the nature of a judgment or final order, or upon matters arising out of the judgment (*Winter v. Innes*, 1838, 4 Myl. & Cr. 101). The greater facilities afforded by modern practice for the disposal of applications in chambers, and, in particular, the remarkable growth of the jurisdiction by originating summons, have had the effect of largely diminishing the number of petitions which are presented so far as administration proceedings are concerned.

*Originating Petition.*—Where proceedings are commenced by petition, it must be marked by a clerk in the office of the Chancery registrars with the name of one of the judges (Order 5, r. 9 (*d*)); and every subsequent petition relating to the same matter must be marked with the name of the same judge (Order 5, r. 9 (*e*)).

Originating petitions are usually presented under the statutory jurisdiction of the Court, as, for instance, for a winding-up order under the Companies Acts, 1862–1890, or for reduction of capital under the Companies Act, 1867 (30 & 31 Vict. c. 131), or for any other purpose under the numerous Acts of Parliament which provide for the exercise of the jurisdiction of the Court by petition. In this connection it may be observed that, although procedure by petition may be prescribed by the statute creating the jurisdiction, yet there is power by virtue of the combined effect of sec. 16 of the Court of Chancery Act, 1855 (18 & 19 Vict. c. 134), and sec. 13 of the Judicature Act, 1884 (47 & 48 Vict. c. 61), for the Court by rule to direct that such application shall be made by summons in chambers. This statutory power has been exercised in numerous cases. Thus the Parliamentary Deposits Act, 1846 (8 & 9 Vict. c. 73), provides that applications thereunder shall be made by petition, for which a summons at chambers has been substituted by the Rule Committee (Order 55, r. 2 (15)); and many similar instances might be given.

*Form of Petition.*—A petition in a pending matter must be entitled in the same manner as the action or matter in which it is presented. Where it is presented under the statutory jurisdiction it should, as a rule, be entitled in the matter of the Act conferring the jurisdiction, as well as in the particular matter to which the petition relates. A petition under the Trustee Act, 1893 (56 & 57 Vict. c. 53), should state the particular sections of the Act under which the application is made (*In re Moss's Trusts*, 1888, 37 Ch. D. 513; *In re Hall's Settlement Trusts*, 1888, 58 L. T. 76).

A petition is addressed to the High Court of Justice, not, as formerly, to the Lord Chancellor.

A petition must state by whom it is presented; and, where the petitioner is not a party to the proceedings, his residence and description must appear on the face of the petition (*Glazbrook v. Gillatt*, 1846, 9 Beav. 492).

Persons under disability petition by their next friend.

In the case of paupers it is provided that no petition shall be presented on behalf of any person admitted to sue or defend as a pauper, except for



the discharge of his solicitor, unless it is signed by his solicitor (Order 16, r. 29).

The petition may be either written or printed (Order 19, r. 9). Generally the rules as to preparation of pleadings apply to a petition (Order 19, rr. 4, 21, 23-25).

*Footnote.*—At the foot of every petition (not being a petition of course), and of every copy thereof, a statement must be made of the persons, if any, intended to be served therewith; and if no person is intended to be served, a statement to that effect must be made at the foot of the petition, and of every copy thereof (Order 52, r. 16). The respondents should be mentioned by name in the footnote, and not merely described as plaintiffs or defendants (*Meyrick v. Laws*, 1877, W. N. 223).

*Petitions, how Answered.*—Petitions (not being for an order of course) are answered in the name of the senior registrar for the time being (Order 62, r. 18), except in the case of petitions presented in the district registries of Liverpool and Manchester, when they are answered in the name of one of such respective registrars (R. S. C., May 1887, r. 2). Answering a petition consists in a memorandum being written in the margin stating the day on which the petition will be heard. As to the practice upon the presentation of a winding-up petition, and as to priority where more than one such petition is presented, see *In re Building Societies Trust*, 1890, 44 Ch. D. 140).

*Service.*—Unless the Court or a judge gives leave to the contrary, there must be at least two clear days between the service of a petition and the day appointed for hearing it (Order 52, r. 17).

Parties interested in the subject-matter of the petition ought to be served; but, under special circumstances, service has been dispensed with (*Lambert v. Newark*, 1849, 3 De G. & Sm. 405; *In re Wise*, 1852, 5 De G. & Sm. 415; *In re Bellasis' Trusts*, 1871, L. R. 12 Eq. 218).

On a petition under the Trustee Relief Act for payment out of Court of a fund to which numerous parties were entitled, most of whom were not before the Court, a former order having been made directing class inquiries, and the chief clerk having made his certificate, it was ordered that the petitioner be at liberty to serve a copy of the petition, the former order, and the chief clerk's certificate upon the several persons named in the certificate, and that the petition should stand over till such persons had been served (*In re Battersby's Trusts*, 1878, 10 Ch. D. 228).

Where the petition is presented in an action, and the defendant has not appeared within the time limited for that purpose by the rules of Court, the petition can be served on him in the usual way without special leave (Order 52, r. 8), or it may be filed against him (Order 19, r. 10; Order 67, r. 4). If the defendant has appeared, service will be effected in the usual way on him or his solicitor. An originating petition must be personally served.

Substituted service may in a proper case be allowed (*In re Blackwood's Settlement*, 1867, W. N. 114; *In re Bonelli's Electric Telegraph Co.*, 1874, L. R. 18 Eq. 655).

There has been a considerable conflict of authority on the question whether leave can be properly given to serve a petition out of the jurisdiction. On the one hand, prior to the Rules of the Supreme Court, 1883, such service was allowed in *In re Bonelli's Electric Telegraph Co.*, 1874, L. R. 18 Ex. 655; *In re Haney's Trusts*, 1875, L. R. 10 Ch. 275; *In re Morant*, 1879, W. N. 144. Even since the decision in *In re Busfield, Whaley v. Busfield*, 1886, 32 Ch. D. 123, where it was held that the Court has no



power to order service out of the jurisdiction, except where it is authorised by statute to do so (per Cotton, L.J., p. 132); and further, that the General Orders of 1883 contain a complete code governing service out of the jurisdiction (per Fry, L.J., p. 133), orders have been made allowing foreign service of petitions under the Trustee Relief Act (*Colls v. Robins*, 1886, 55 L. T. 479; *In re Gordon's Settlement Trusts*, 1887, W. N. 192). But North, J., subsequently declined to act upon the last-named case, and the Court of Appeal left the question undecided, merely giving leave to serve solicitors who had presented a former petition and were willing to accept service (*In re Jellard*, 1888, 39 Ch. D. 424). In view of that case, Kekewich, J., refused leave in *In re Stanway's Trusts*, 1892, W. N. 11 (see further, SERVICE OUT OF THE JURISDICTION).

*Appearance by Parties under Disability.*—An infant served with a petition appears by guardian *ad litem*. No order is now necessary for the appointment of such guardian, but the solicitor by whom the infant appears must previously make and file an affidavit in the prescribed form (Order 16, r. 19). In the case of a respondent to a petition by a person of unsound mind, not so found by inquisition, an order of course to appoint a guardian *ad litem* must be obtained (*In re Greaves*, 1854, 2 W. R. 353).

*Security for Costs.*—A petitioner resident out of the jurisdiction may be ordered to give security for costs (*Ex parte Seidler*, 1841, 12 Sim. 166; *Atkins v. Cooke*, 1857, 3 Drew. 694; *In re Home Assurance Association*, 1871, L. R. 12 Eq. 112), except where he is a party to the cause (*Cochrane v. Fearon*, 1854, 18 Jur. 368). A party served with notice of judgment, and petitioning, has been ordered to give security (*Partington v. Reynolds*, 1858, 6 W. R. 307).

*Setting down and hearing.*—A petition is set down for hearing before the judge with whose name it is marked. Each judge of the Chancery Division hears petitions on certain days in each sittings (usually on one day in each week). Petitions are heard in the order in which they appear in the paper, unopposed petitions being taken first.

*Evidence.*—Evidence on a petition may be given by affidavit; but the Court or a judge may, on the application of either party, order the attendance for cross-examination of the person making such affidavit (Order 38, r. 1). The rule leaves absolute discretion to the judge either to grant or refuse leave to cross-examine a witness on an affidavit made in support of an interlocutory application (*La Trinidad Limited v. Browne*, 1887, 36 W. R. 138).

After amendment of a petition it is not necessary to have the affidavits resworn (*In re Harris*, 1862, 8 Jur. N. S. 166; *Fisher v. Coffey*, 1855, 1 Jur. N. S. 956). In *In re Varteg Chapel*, 1853, 10 Hare, App. xxxvii., affidavits already sworn were made evidence after amendment in the title of a petition by being exhibited to an affidavit referring to them.

Affidavits sworn before presentation of the petition have been accepted (*In re Varley's Trust Estate*, 1865, 14 W. R. 98; *In re Gombault's Trusts*, 1868, W. N. 243).

Affidavits erroneously entitled were allowed to be taken off the file, and resworn in their proper title (*Pearson v. Wilcox*, 1853, 10 Hare, App. xxxv.).

Affidavits sworn in one cause or matter may, by leave of the Court, be used in another cause or matter (*Jones v. Turnbull*, 1853, 17 Jur. 851; *In re Pickance's Trusts*, 1853, 10 Hare, App. xxxv.).

*Amendment.*—Leave may be given to amend a petition. Such leave is usually obtained at the hearing. The amendments may extend to facts



which have occurred since the petition was presented, or since leave to amend (*Maude v. Maude*, 1852, 5 De G. & Sm. 418; *Robinson v. Harrison*, 1852, 1 Drew. 307; *In re Westbrook's Trusts*, 1871, L. R. 11 Eq. 252).

Where the petitioner died after presentation of the petition, leave was given to amend by stating the fact, and substituting a new petitioner (*In re Wilkinson's Settled Estates*, 1869, L. R. 9 Eq. 71).

Leave has been given to amend after the order has been made, and even after it has been completed by being passed and entered (*Hislop v. Wykeham*, 1855, 3 W. R. 286; *In re Havelock's Trusts*, 1865, 14 W. R. 26, 174; *In re Bunnell's Trusts*, 1865, 1 Jur. N. S. 921). Where a petition had been presented without the authority of some of several co-petitioners, and an order had been made on it, an application to rescind the order was refused, but liberty to amend by striking out the applicants as petitioners was given (*In re Savage*, 1880, 15 Ch. D. 557).

An amended petition need not be re-served (*In re Cartwright's Trust*, 1860, 8 W. R. 492; *In re Medow's Trusts*, 1864, 12 W. R. 595).

*Effect of Order on opposed Petition.*—A petition is just as much a litigious proceeding as a bill in the Court of Chancery, if there is jurisdiction to bring the parties before the Court on it. And, therefore, where a petition under the National Debt Act, 1870 (33 & 34 Vict. c. 71), had been heard on the merits, and dismissed on the ground that the petitioner had failed to make out his title, it was held that he could not, on the subsequent discovery of fresh evidence, present a fresh petition for the same object without leave of the Court previously obtained (*In re May*, 1885, 37 Ch. D. 516).

*Death of Petitioner.*—Where a sole petitioner dies after an order made on the petition directing inquiries, and whilst those inquiries are pending, the Court will order the petition to be continued and carried on by the representatives of the petitioner (*In re Allan's Estate*, 1875, 1 Ch. D. 82).

*Referring Petition to Chambers.*—Where the title of the parties is complicated and requires careful investigation, it is common to adjourn the petition into Chambers. In such case a note of the adjournment is sent by the registrar to the Master. After the evidence has been properly considered, and found satisfactory, a minute of the order to be made is endorsed in the fold of the petition, and the order is drawn up by the registrar. Sometimes an order is made on the hearing of the petition directing inquiries to be made in Chambers, and adjourning the further hearing of the petition. When that course is adopted, after the certificate of the Master has been filed, the petition will be restored to the paper for further hearing.

*Filing Petition.*—No order on a petition can be passed until the original has been filed in the central office (Order 61, r. 15). Where the original petition was lost the Court has allowed a copy to be filed (*Sanderson v. Walker*, 1836, 1 Myl. & Cr. 359; *Andrews v. Walton*, 1836, 1 Myl. & Cr. 360; *Smith v. Harwood*, 1853, 1 Sm. & G. 137).

*Where Respondent does not appear.*—It is much to be regretted that the practice does not provide for a respondent entering a formal appearance to an originating petition. The want of such a provision occasionally causes no small inconvenience. For, inasmuch as an appearance is not required to be entered, there can be no default of appearance, and therefore no power to bind the respondent by filing any subsequent summons or other proceeding under Order 67, r. 4. It seems, therefore, that in such a case, if, on the hearing of the petition, an order is made directing inquiries, the petitioner



has no course open to him but to serve the summons to proceed on the respondent personally.

*Court of Appeal.*—The Court of Appeal has no jurisdiction to hear an original petition, but can only do so by way of appeal from an order of a judge of first instance (*In re Dunraven Adare Coal and Iron Co.*, 1875, 24 W. R. 37; *Brown v. Collins*, 1883, W. N. 155; 25 Ch. D. 56).

*Costs.*—Where any petition in a cause or matter assigned to the Chancery Division is served, and notice is given to the party served that in case of his appearance in Court his costs will be objected to, and accompanied by a tender of costs of perusing the same, the amount to be tendered is £1, 10s. The party making such payment will be allowed the same in his costs, provided such service was proper, but not otherwise. This will not, however, prejudice the right of either party to costs, or to object to costs where no such tender is made, or where the Court or judge shall consider the party entitled, notwithstanding such notice or tender, to appear in Court. In any other case in which a solicitor of a party served necessarily or properly peruses any such petition, without appearing thereon, he is to be allowed a fee not exceeding the amount aforesaid (Order 65, r. 27 (19)). Under the old practice the sum to be tendered was two guineas.

Where there is no tender the petitioner may be ordered to pay the respondent's costs of appearance, even though he have no interest (*Wood v. Boucher*, 1870, L. R. 6 Ch. 77; *Clark v. Simpson*, 1868, L. R. 6 Eq. 336; *In re Gore Langton's Estates*, 1875, L. R. 10 Ch. 328; *In re Halstead United Charities*, 1875, L. R. 20 Eq. 48; *Ex parte Jones*, 1880, 14 Ch. D. 624). If a petitioner, on serving a petition on a respondent, the necessity for whose appearance is a matter of doubt, at the same time tenders him the prescribed fee in order to enable him to get legal advice, and the respondent appears, the Court will consider whether the appearance be justified or not; and if it finds that the appearance was not justified, will not order the petitioner to pay such respondent's costs of appearance. Otherwise the respondent must have his costs (*In re Duggan's Trusts*, 1869, L. R. 8 Eq. 698).

Where no tender was made to the respondents, they were allowed a fixed sum of two guineas each (*Somes v. Martin*, 1882, W. N. 113).

Trustees were refused their costs of appearance after tender (*In re Sutton*, 1882, 21 Ch. D. 855; but see *In re Vardon's Trusts*, 1885, 33 W. R. 297).

Where any party appears upon an application or proceeding in which he is not interested, or upon which, according to the practice of the Court, he ought not to attend, he is not to be allowed any costs of such appearance, unless the Court or a judge shall expressly direct such costs to be allowed (Order 65, r. 27 (23)).

If two petitions are presented where the object sought might have been obtained by one petition, the petitioner will be ordered to pay the extra costs occasioned by such a proceeding (*In re Wortham*, 1851, 4 De G. & Sm. 415).

Where a summons is prescribed as the mode of application, there is a discretion in the Court to allow the costs of a petition (*In re Bethlehem and Bridewell Hospitals*, 1885, 30 Ch. D. 541).

[*Authorities.*—*The Annual Practice*, 1898; Daniell's *Chancery Practice*, 6th ed., 1884, pp. 1561–1573; Morgan and Wurtzburg on *Costs*, 1882; Seton's *Judgments and Orders*, 5th ed., 1891, ch. xxiii.; Williams on *Petitions in Chancery and Lunacy*, 1880.]



**Petition of Right** (*Petition de droit*).

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I. *Nature and Origin of Petition of Right*.—This is an ancient common law remedy against the Crown, for obtaining possession or restitution of either real or personal property, and is said to owe its origin to Edward I. (Chitty's *Prerogatives of the Crown*, 340; Bacon's *Abr.* "Prerogative" (E.) 475; *per curiam* in *Tobin v. R.*, 1864, 16 C. B. N. S. at p. 356), before whose reign, according to some authorities, an action was maintainable by a subject against the Crown (Fitzherbert's *Abr.* "Error," pl. 22; Broom's *Legal Maxims*, 6th ed., p. 53 (i.); but see *per curiam* in *Tobin v. R.*, *supra*), a method of procedure so obviously inappropriate, that the remedy by petition of right was substituted for it, with the object of reconciling the dignity of the Crown and the rights of the subject (per Lord Cottenham, L.C., in *Moncton v. A.-G.*, 1848, 2 Mac. & G. at p. 412). The origin of the term "Petition of Right" seems to be somewhat doubtful, but it is probably derived from the words with which the petition formerly concluded and was indorsed (Clode's *Petition of Right*, pp. 25, 26; but see Manning's *Exchequer Practice, Revenue Branch*, p. 84). The remedy is, however, substantially, as well as nominally, a petition of *right*, as the prayer of it is grantable *ex debito justitiæ*, in accordance with the words of *Magna Carta*, "*Nulli vendemus, nulli negabimus, aut differemus justitiam vel rectum*" (Chitty's *Prerogatives of the Crown*, p. 345; Manning's *Exchequer Practice, Revenue Branch*, p. 84). At all events, though the granting of the *fiat* by the Crown is in itself an act of *grace* (*Tobin v. R.*, 1863, 32 L. J. C. P. at p. 221; *Irwin v. Grey*, 1862, 3 F. & F. 635), it is not competent for the Crown or its responsible advisers to refuse capriciously to put into a due course of investigation any proper question raised on a petition of right, though the form and application be to the grace and favour of the Crown (per Lord Langdale, M. R., in *Ryves v. The Duke of Wellington*, 1846, 9 Beav. at p. 600).

II. *When Remedy by Petition of Right available*.—The remedy by petition of right arises only where the rights of the Crown are *directly* in question, for, where they are only *incidentally* concerned in an action, the Attorney-General may be made a defendant as representing the Crown (Daniell's *Chancery Practice*, 6th ed., pp. 155 *et seq.*, p. 1538). Stated in general terms, the only cases in which a petition of right is available are where the land or goods or money of a subject have found their way into the possession of the Crown, and the purpose of the petition is to obtain restitution, or, if restitution cannot be given, compensation in money; or when a claim arises out of a contract, as for goods supplied to the Crown or to the public service (*per curiam* in *Feather v. R.*, 1865, 6 B. & S. at p. 294, and in *Windsor and Annapolis Rwy. Co. v. The Queen and the Western Counties Rwy. Co.*, 1886, 11 App. Cas. at pp. 614, 615). Thus it will lie to compel payment of annuities granted by the Crown (*The Bankers' case*, 1690, 14 St. Tri. 1); for a pension out of the Civil List, at the suit of an assignee (*Oldham v. Lords of the Treasury*, 1823, cited 6 Sim. 220; *Priddy*



*v. Rose*, 1817, 3 Mer. 86; 17 R. R. 24; Chitty's *Prerogatives of the Crown*, 344), for a mere money claim (per Lord Denman, C.J., in *The Baron de Bode v. R.*, 1845-1851, 6 St. Tri. N. S. at p. 262; *Executors of Percival v. R.*, 1864, 33 L. J. Ex. 289; *Executors of Cobbold Perry v. R.*, 1868, L. R. 4 Ex. 27; *Crossman and Another v. R.*, 1886, 18 Q. B. D. 256); *semble*, for the return of overpaid probate duty (*In re Nathan*, 1884, 12 Q. B. D. 461; disapproving of *R. v. Lords Commissioners of the Treasury*, 1835, 4 Ad. & E. 286); for a rent-charge (*Wicks v. Dennis*, 1589, 1 Leon. 190); to recover hereditaments (*Sadlers' case*, 1588, 4 Rep. 426; Com. Dig. "Prerogative" (D.) 78; Bacon's *Abr.* "Prerogative" (E.) 475) or leaseholds (*In re Gosman*, 1880, 15 Ch. D. 67); and to enforce an agreement for a lease granted by the Crown (*James v. R.*, 1874, L. R. 17 Eq. 502; *Davis v. Adams*, 1876, W. N. 202). The remedy by petition of right also lies for breach of contract, even though resulting in unliquidated damages, or to recover money claimed either by way of debt or by way of damages on breach of contract (*Thomas v. R.*, 1874, L. R. 10 Q. B. 31; *Feather v. R.*, 1865, 6 B. & S. at pp. 293, 294), and this whether the breach of contract complained of be occasioned by the acts or by the omissions of the Crown officials (*Windsor and Annapolis Rwy. Co. v. R.*, 1886, 11 App. Cas. 607), or arise otherwise in respect of matters of contract (Seton on *Judgments*, 5th ed., vol. i. p. 349; and see *Palmer v. Hutchinson*, 1881, 6 App. Cas. 619; *Macbeath v. Haldimand*, 1786, 1 T. R. 172, 176; 1 R. R. 177; *Oldham v. Lords of the Treasury*, 1823, cited 6 Sim. 220; *Churchward v. R.*, 1865, L. R. 1 Q. B. 173, 186).

III. *When Remedy by Petition of Right not available.*—On the other hand, a petition of right must be founded on a violation of some legal right, otherwise it is not available (*per curiam* in *Feather v. R.*, 1865, 6 B. & S. at p. 295). It does not, however, extend to *all* such matters as are cognisable in a Court of law or equity between subject and subject. Thus, notwithstanding alleged decisions to the contrary (collected in 6 M. & G. n. (a) pp. 251 *et seq.*), a petition of right does not lie in respect of a claim founded upon *tort*, because the Crown can do no wrong (*Tobin v. R.*, 1864, 16 C. B. N. S. 310); nor for compensation for a wrongful act done by a servant of the Crown in the supposed performance of his duty (*ibid.*); nor against the succeeding sovereign for injuries sustained in the preceding reign (*Canterbury, Viscount v. R.*, 1843, 12 L. J. Ch. 281). In the following cases, also, the petition of right failed, namely, where it was sought to recover from the Crown, out of a fund paid under a treaty with a foreign Power, as compensation for debts due to British subjects, the payment of an amount claimed in respect of one of such debts (*Rustomjee v. R.*, 1876, 2 Q. B. D. 69; and see *Baron de Bode v. R.*, 1851, 3 H. L. 449; S. C. 6 St. Tri. N. S. 237); where the claim was for compensation on being compulsorily retired upon half-pay from an office alleged to be permanent (*In re Tufnell*, 1876, 3 Ch. D. 164; *Mitchell v. R.*, 1890, 6 T. L. R. 181, 332); for an increase of a superannuation allowance (*Cooper v. R.*, 1880, 28 W. R. 611); damages for an infringement of a patent right (*Feather v. R.*, 1865, 6 B. & S. 257; and see *Dixon v. Small Arms Co.*, 1876, 1 App. Cas. 632); repayment of income tax (*Holborn Viaduct Land Co. v. R.*, 1841, 5 J. P. 341); debts due from an Indian reigning prince before the annexation of his province by the East India Co. (*Frith v. R.*, 1872, L. R. 7 Ex. 365); payment, to the persons entitled, of booty granted by the Crown to the Secretary of State for India, in trust for the officers and men of certain forces, and to be distributed according to certain scales and proportions (*In re the Banda and Kirwee Booty, Kinloch v. R.*, 1882, W. N. p. 164); lands in a colony which have been vested in the Crown by an Act of the Pro-



vincial Legislature (*In re Holmes*, 1861, 2 John. & H. 527; S. C. *nom. Holmes v. R.*, 1861, 8 Jur. N. S. 76).

IV. *Parties to Petitions of Right*.—All subjects of the Crown, entitled to and governed by the common law of England, may present a petition of right (Clode's *Petition of Right*, 35). It is, however, doubtful whether an alien can do so (*ibid.*), save, perhaps, under sec. 20 of the Colonial Stock Act, 1877 (40 & 41 Vict. c. 59), which provides that *any* person claiming to be interested in colonial stock, to which the Act applies, or in any dividend thereon, may present a petition of right in England in relation to such stock or dividend. Whether an infant can present a petition of right, either in person or by next friend, has never been decided, but, *semble*, if he does so in person, it is ground for demurrer (see Manning's *Practice of the Exchequer, Revenue Branch*, p. 86). The petitioner is termed the suppliant, and may, if proceeding under the Petitions of Right Act, 1860 (23 & 24 Vict. c. 34), and in the Chancery Division, sue *in forma pauperis* (Order, 1st February 1862; Morgan's *Chancery Acts and Orders*, 6th ed., p. 202; Daniell's *Chancery Practice*, 6th ed., p. 1540). It is, *semble*, wrong to join anyone with the Crown as respondent to a petition of right (*Kirk v. R.*, 1872, L. R. 14 Eq. 558), though, where the object of the petition is to recover real or personal property, third parties in possession, occupation, or enjoyment thereof may, under sec. 5 of the Petitions of Right Act, 1860 (23 & 24 Vict. c. 34), be brought in in manner prescribed by that section (see Clode's *Petition of Right*, pp. 171 *et seq.*).

V. *Within what Time the Remedy by Petition of Right must be prosecuted*.—The Statute of Limitations does not apply to a petition of right (*Rustomjee v. R.*, 1876, 1 Q. B. D. 487), and the Crown cannot plead it in answer to such a petition, there being no limit of time for the recovery of Crown debts (*ibid.*, and see *Lambert v. Taylor*, 1825, 4 Barn. & Cress. 138; Banning's *Limitation of Actions*, 2nd ed., p. 274; Darby and Bosanquet's *Petition of Right*, 2nd ed., p. 518), as the Crown cannot be bound by or have the benefit of Acts of Parliament which have relation only to the course of procedure between subject and subject (per Cockburn, C.J., in *Rustomjee v. R.*, 1876, 1 Q. B. D. at p. 492; and see *Perry v. Eames*, [1891] 1 Ch. 658). It is, however, expressly provided by the Intestates Estate Act, 1884 (47 & 48 Vict. c. 71), s. 3, that a petition of right shall not be presented in respect of the personal estate of any deceased person, or any part or share thereof, except within the same time as, and subject to the same rules of law and equity in, and subject to which, an action for the like purpose might be brought by or against a subject.

VI. *Form of Procedure by Petition of Right*.—(a) *The Petitions of Right Act, 1860*.—A petition of right was always available as a remedy, even where "*Monstrans de droit*" (see MONSTRANS DE DROIT) or "*traverse of office*" (see TRAVERSE OF OFFICE) was likewise applicable (Chitty's *Prerogatives of the Crown*, p. 341). It was not, however, usual to adopt it, under such circumstances, owing to its being more dilatory and costly, than either of the other two remedies above named (Chitty's *Prerogatives of the Crown*, p. 341). Since, however, the passing of the Petitions of Right Act, 1860 (23 & 24 Vict. c. 34), commonly called Bovill's Act, which has simplified the procedure by petition of right, no other remedy is now ever resorted to by a subject against the Crown. This Act does not give any cause of petition or remedy against the Crown which was not previously possessed (*Tobin v. R.*, 1864, 16 C. B. N. S. 310). It may be mentioned that the Act has been applied to Ireland by the Petitions of Right (Ireland) Act, 1873 (36 & 37 Vict. c. 69), while, in many of the colonies



and dependencies of the Crown, and notably in Australasia (see *Robertson v. Dumaresq*, 1864, 2 Moo. P. C. N. S. 66) and Canada (see *R. v. Doutre*, 1884, 9 App. Cas. 745), local Acts and Ordinances have been passed, giving the subject means of redress by petition of right.

(b) *Method of Procedure by Petition of Right before the Petitions of Right Act, 1860.*—The old common law method of procedure on petition of right is expressly preserved by sec. 18 of the Petitions of Right Act, 1860. As, however, it is now practically obsolete, a very brief reference thereto must suffice. The petition is addressed to the sovereign alone, and it has this peculiarity about it, namely, that a *prima facie* case on oath must be established, *ex parte*, before the petition can be heard at all (per Wickens, V.C., in *Kirk v. R.*, 1872, L. R. 14 Eq. at p. 563). That is to say, the petition is referred to the Lord Chancellor, in the first instance, with the indorsement thereon, “*Let right be done*” (*Moncton v. A.-G.*, 1848, 2 Mac. & G. 402), and thereupon a commission issues to ascertain the facts upon which the suppliant’s claim is founded, unless the Attorney-General should be willing to admit the facts, and take issue upon them by demurrer (*Baron de Bode v. R.*, 1845–1851, 6 St. Tri. N. S. 237; *Kirk v. R.*, 1872, L. R. 14 Eq. at p. 563). Where the petition was not, by special indorsement thereon, remitted to a particular Court for investigation, it formerly went to the Court of Chancery (*In re Perry*, 1837, 2 Mee. & W. 873; Stamford’s *Prerog.* c. 22), and will now, *semble*, be assigned to the Chancery Division (Judicature Act, 1873, s. 34). After the return of the commission, the Attorney-General is at liberty to plead in bar, and the merits are determined as between subject and subject (3 Black. Com. p. 276). The judgment, if against the Crown, is that known as *amoveas manus* (*ibid.*); if for the Crown, “that the suppliant take nothing by his petition” (*Baron de Bode v. R.*, 1845–1851, 13 Q. B. at p. 380; S. C. 6 St. Tri. N. S. 237). Error lies upon a judgment for the Crown (*Baron de Bode v. R.*, *supra*).

(c) *The New Procedure under the Petitions of Right Act, 1860.*—The new procedure under the Petitions of Right Act, 1860 (23 & 24 Vict. c. 34), requires more detailed notice. As appears from the preamble, the object of this statute is to assimilate the proceedings relating to petitions of right “as nearly as may be to the course of practice and procedure now in force in actions . . . between subject and subject”; and it is subsequently provided, by sec. 7, that the practice and course of procedure in such actions shall extend to petitions of right, so far as applicable; while the Statute Law Revision and Civil Procedure Act, 1881 (44 & 45 Vict. c. 59), s. 6 (which repeals s. 15 of the Petitions of Right Act, 1860), extends to all proceedings by or against the Crown the enactments relating to the making of rules of Court contained in the Judicature Act, 1875, and Acts amending the same. No mention is made in the Judicature Acts or Rules of petitions of right, but, nevertheless, they certainly to some extent apply thereto, as, for example, Order 34, r. 1, of the R. S. C., which enables a special case to be stated (see *Crossman v. R.*, 1887, 18 Q. B. D. 256); while, on the other hand, they do not prevent a demurrer to a petition of right being put in by the Attorney-General on behalf of the Crown (*Northam Bridge Co. v. R.*, 1886, cited in Clode’s *Petition of Right*, p. 94; *In re the Banda and Kirwee Booty*, *Kinloch v. R.*, 1884, W. N. 80; Seton on *Judgments*, 5th ed., p. 350), though, by Order 25, r. 1, of the R. S. C., demurrers are abolished. Moreover, the General Order of 1st February 1862, regulating proceedings in Chancery under the Petitions of Right Act, 1860, and made under sec. 15 thereof, since repealed, is not, it seems, annulled (Seton on *Judgments*, 5th ed., p. 350; Morgan’s *Chancery*



*Acts and Orders*, 6th ed., p. 202), being, apparently, preserved by sec. 21 of the Judicature Act, 1875, which saves existing procedure of Courts, where not inconsistent with the Act or Rules. A petition of right may be intitled in the Queen's Bench Division, or in the Chancery Division of the High Court of Justice (Petitions of Right Act, 1860, s. 1; Judicature Act, 1873, s. 34), or in the Probate, Divorce, or Admiralty Division, if the subject-matter of the petition, or any material part thereof, arises out of the exercise of any belligerent right on behalf of the Crown, or would be cognisable in a Prize Court within the Queen's dominions if the same were a matter in dispute between private persons (Naval Prize Act, 1864, 27 & 28 Vict. c. 25, s. 52; Judicature Act, 1873, s. 34). If the petition be intitled in the Chancery Division it will be assigned to a judge, by ballot, in the usual way; if in the Queen's Bench Division the venue for trial must be written in the margin (*Annual Practice*, 1898, p. 939). The Lord Chancellor, on the application of the Attorney-General, or of the suppliant, may change the Court in which the petition shall be prosecuted or the venue for the trial of the same (Petitions of Right Act, 1860, s. 4). As regards the form of the petition, which may be either written or printed (*Annual Practice*, 1898, p. 939), it must be addressed to the sovereign in the form or to the effect prescribed by the Petitions of Right Act, 1860 (Sched. Form 1), and should state the Christian and surname and usual place of abode of the suppliant, and of his solicitor, if any, by whom the same is presented, and must set forth, with convenient certainty, the facts entitling the suppliant to relief, and must be signed by such suppliant, his counsel or solicitor (Petitions of Right Act, 1860, s. 1). A petition of right is not a pleading in the ordinary acceptation of the term; but it is framed in the most general terms, like an article in a newspaper (per Willes, J., in *Tobin v. R.*, 1864, 32 L. J. C. P. at p. 224; S. C. 16 C. B. N. S. 310). It must, however, state *the whole* of the title or titles or claim of the Crown (Chitty's *Prerogatives of the Crown*, p. 245; Bacon's *Abr.* "Prerogative," pp. 478, 479). Moreover, in framing the petition, it is important to remember what has already been stated as to the circumstances under which this remedy lies, and that now, by express enactment, the relief to which a suppliant under the Petitions of Right Act, 1860, is entitled "shall comprehend every species of relief claimed or prayed for in any such petition of right, whether a restitution of any incorporeal right, or a return of lands or chattels, or a payment of money or damages, or otherwise" (Petitions of Right Act, 1860, s. 16). If the suppliant is a British subject, it should be so stated in the petition (Clode's *Petition of Right*, p. 35), and also, *semble*, if it be the case, that the matters occasioning the petition arose out of England (*Rustomjee v. R.*, 1876, 1 Q. B. D. 487; Clode's *Petition of Right*, p. 160). The petition concludes, in the usual manner, with a prayer for relief, which should be "*special*" and not "*general*" (Clode's *Petition of Right*, p. 161), as in *Rustomjee v. R.*, *ubi supra*; *James v. R.*, 1874, L. R. 17 Eq. 502, 503; *In re Gosman*, 1880, 15 Ch. D. 67; and *In re Brain*, 1874, L. R. 18 Eq. 389, 392. The petition must be signed by the suppliant, his counsel or solicitor (Petitions of Right Act, 1860, s. 1), and afterwards left at the Home Office for the *fiat* of the Crown "*that right be done*" (Petitions of Right Act, 1860, s. 2). The granting of the *fiat* is an act of grace (per Erle, C.J., in *Tobin v. R.*, 1863, 14 C. B. N. S. at p. 521; *Irwin v. Grey*, 1862, 3 F. & F. 635), and without such *fiat* there is no jurisdiction to order the petition to be set down for trial (*In re Mitchell*, 1896, 12 T. L. R. 324, 458). The petition should also be sealed with the Home Office seal, and afterwards filed at the Writ, etc.,



Department, Central Office (*Annual Practice*, 1898, p. 939). The fees on filing are, for the original petition, £1 (impressed); copies for service, 5s. each (*ibid.*). One sealed copy is also required to be left at the office of the Treasury Solicitor, with the following indorsement: "The suppliant prays for a plea or answer on behalf of Her Majesty within twenty-eight days after the date hereof, or otherwise that the petition may be taken as confessed," which should be dated and signed (Petitions of Right Act, 1860, s. 3, Sched. Form No. 2). The petition is then transmitted, by the Treasury Solicitor, to the particular department to which the subject-matter of such petition may relate, to be duly prosecuted in the Court in which the same shall be intitled (*ibid.* s. 3). As regards service of the petition on persons other than the Crown, in cases where the suppliant claims to recover real or personal property, or any right in or to the same, the practice is regulated by sec. 5 of the Petitions of Right Act, 1860, to which reference must be made. The Crown has twenty-eight days for answering, pleading, or demurring to the petition, or such further time as shall be allowed by a Court or a judge (Petitions of Right Act, 1860, s. 4), and may, by or in the name of the Attorney-General, and without leave, plead and demur, reply and demur, or in any other way plead double (per Williams, J., in *Tobin v. R.*, 1863, 14 C. B. N. S. at p. 512; Petitions of Right Act, 1860, s. 6), but cannot set up the Statute of Limitations, which does not apply to a petition of right (*Rustomjee v. R.*, 1876, 1 Q. B. D. 487, 490). Discovery of documents may be obtained by the Crown in support of its case (*Tomline v. R.*, 1879, 4 Ex. D. 252), though it cannot be compelled to give discovery to a subject (*Thomas v. R.*, 1874, L. R. 10 Q. B. 44; *A.-G. v. Newcastle-upon-Tyne Corporation*, 1897, 66 L. J. Q. B. 593). In case of default on the part of the Crown, or of any third party brought in under sec. 5 of the Petitions of Right Act, 1860, to answer or plead to the petition, an order may be obtained that the petition be taken as confessed, and leave given to sign judgment in favour of the suppliant (Petitions of Right Act, 1860, s. 8). The judgment, for or against the suppliant, is in the form prescribed (Petitions of Right Act, 1860, s. 9). If it is against the Crown, it possesses such and the same effect as the old judgment of *amoveas manus* (*ibid.* s. 10), and is certified to the Treasury or Treasurer of the Household (*ibid.* s. 13), except in cases under the Colonial Stock Act, 1877 (40 & 41 Vict. c. 59), to which a special provision contained in sec. 20 thereof applies. With regard to costs recoverable by or against the Crown, see secs. 11 and 12 of the Petitions of Right Act, 1860, and, as to satisfaction of judgment and costs, sec. 14. On the subject of appeals, the Petitions of Right Act, 1860, provides that the existing laws and statutes, practice and course of procedure in regard thereto, shall, so far as the same may be applicable, apply to petitions of right.

[*Authorities.*—All the principal authorities are mentioned in the text.]

**Petition of Right (Const. Law).**—During the first session of the third Parliament of Charles I. (1627–1628) the Commons, induced by illegalities committed by or on behalf of the King, determined, at the instance of Coke, to "put up a petition of right." After discussions with the Lords, and an attempt to evade assent by the King, the statute was passed, known as the Petition of Right, 1628 (3 Car. I. c. 1). It consists of eight clauses, aimed at grievances grouped under four heads: (a) illegal exactions; (b) arbitrary imprisonment; (c) billeting of soldiers and marines; (d) martial law.



The petition recites the Statutum de Tallagio non Concedendo (Edw. I.) as an authority for the proposition that no talliage or aid should be laid or levied by the King without the assent of the archbishops, bishops, earls, knights, burgesses and other freemen of the commonalty of the realm. Whether this "statutum" was in fact a statute or not is not by any means clear, but this recital has the effect of giving it statutory authority, even if it did not possess it before. The petition further recites a statute of Edward III., enacting that no person shall be compelled to make loans to the Crown. The Great Charter and a statute (28 Edw. III.) are cited on the question of arbitrary imprisonment, whilst the Charter and 25 Edw. III. are prayed in aid of relief against the illegal enforcement of martial law. The petition proceeds to recite breaches of these statutes. The remedies prayed for, and finally granted by the Crown, were that (i.) no man should be compelled to make or yield any gift, loan, benevolence, tax, or such like charge without common assent by Act of Parliament; nor (ii.) be called to make answer or take oath, or to give attendance, or be confined or otherwise molested or disquieted for refusal to make the loan or benevolence; nor (iii.) be imprisoned or detained without cause showed, only under justification of the King's special command; also (iv.) removal of the soldiers and mariners which were billeted on the inhabitants without legal warrant; also (v.) revocation of commissions of martial law, and that no such commissions should issue in future.

**Petitions, Parliamentary.**—The right of petitioning the Crown and Parliament, for redress of grievances, is an acknowledged fundamental principle of the Constitution, which has been uninterruptedly exercised from the earliest times. Before the constitution of Parliament had assumed its present definite form, and while its judicial and legislative functions were ill-defined, petitions were presented to the Crown, and to the great councils of the realm, for the redress of such grievances as were beyond the jurisdiction of the common law; of which there are examples in the Tower of the date of Edward I.; up till when it is supposed that the aggrieved parties appeared in person before the great council, or before inquests in the country composed of officers appointed by the Crown. If it be assumed, as it is by some, that the separation of the Lords and Commons into two distinct Houses took place in the reign of Henry III., these petitions appear to have been addressed to the Lords alone; if, as others assert, in the seventeenth year of Edward III., they must have been addressed to the whole body then constituting the High Court of Parliament. However this may be, it is certain that, from the reign of Edward I. until the last year of that of Richard II., there are no petitions addressed exclusively to the Commons. During this period, petitions were, with rare exceptions, for redress of private wrongs, and were tried in a judicial rather than a legislative manner, by auditors or triers, who were committees of prelates, peers, and judges, who examined the petitions, and, if no redress was available at common law, sent on the matter for settlement by the High Court of Parliament. Petitions were received in the first place by officers appointed thereunto, usually the Masters in Chancery, who sat in some public place accessible to the people, and transmitted them to the triers. The functions of both the receivers and triers have long since been superseded by the immediate authority of Parliament at large; though (excepting that no lords spiritual are now appointed) their appointment at the opening of every Parliament has been continued by the House of



Lords without interruption. In the reign of Henry IV. a great number of petitions began to be addressed to the House of Commons, but the jurisdiction of the Court of Chancery had in the meantime provided remedial relief to the subject, and petitions were now more in the nature of private bills than applications in respect of private wrongs; indeed, the orders of Parliament made upon them can only be regarded as special statutes of private or local application. As the legislative and judicial limits became more distinct, petitions applied more distinctly for legislative remedies, and were preferred to Parliament through the Commons; but in passing private bills, Parliament has retained the mixed judicial and legislative character of ancient times. In later times, petitions were examined in the Lords, in the manner above described, or by committees of a similar character; and in the Commons, by a committee of grievances and other specially appointed committees; but, since the Commonwealth, in the case of both Houses, by themselves in the first instance; only being referred in particular cases to committees. In early times, all petitions prayed the redress of some specific grievance; but, after the Revolution of 1688, the present practice of petitioning, in respect of general measures of public policy and concern, was gradually introduced.

By the 5th clause of the memorable Declaration, delivered by the Lords and Commons to the Prince and Princess of Orange, 13th February 1688, and afterwards enacted in Parliament as the Bill of Rights, it was declared "That it is the right of the subjects to petition the king, and all commitments and prosecutions for such petitioning are illegal"; and this right is recognised in the statute itself (1 Will. & Mary, sess. 2, c. 2) as among the "true, antient, and indubitable rights of the people of this kingdom"; and again reasserted in the Act of Settlement (12 & 13 Will. III. c. 2).

The existing practice as regards petitions may be considered under three divisions, viz.—(1) their form; (2) their character and substance; (3) their presentation.

(1) Petitions should be written on parchment or paper (for a printed or lithographed petition will not be received by the Commons) in the English language or with a translation certified by the presenting member to be correct, free from interlineation or erasure, signed by the petitioner (not by an agent, except in case of incapacity), and at least one signature should be on the same sheet or skin as the petition, without any other document annexed; if that of a corporation aggregate, under their common seal; and, if to the Lords, superscribed "To the Right Honourable the Lords spiritual and temporal in Parliament assembled"; if to the Commons, "To the Honourable the Commons of the United Kingdom of Great Britain and Ireland in Parliament assembled," followed by a general description of the party or parties to the petition, viz. "The humble petition of —— sheweth." At the conclusion of the allegations follows the "prayer," expressing the object of the petition, ending with the formal words, "and your petitioners, as in duty bound, will ever pray, etc."; to which are added the signature or marks of the parties. The omission of a prayer is a fatal flaw, *i.e.* a document in the style of a declaration, an address of thanks or remonstrance, without a form of prayer, will not be received.

Any forgery or fraud in the preparation or signature of petitions is punished as a breach of privilege, and the petition rejected, if so decided.

(2) Petitions should be respectful and temperate in their character, free from disrespect either to the sovereign, or to Parliament, or to the Courts of Justice or other tribunals or constituted authority; and, if objected to on such a ground, should be read at the table of the House, and are liable



to be not allowed to lie on the table; may not allude to debates in either House, nor to intended motions, if merely announced in debate; though otherwise after notices of motions formally given; and, in the Lords, petitions relating to a bill still pending in the Commons, or already rejected there, will not be received.

(3) Petitions must be presented by a member of the House to which they are addressed (signed by him at the beginning); in the case of the corporation of the city of London, by the sheriffs at the bar, or by one sheriff only, if one be a member or unavoidably absent; or, if both are absent, by the Lord Mayor, an alderman, and some of the common council; so also in the case of the corporation of the city of Dublin. A member petitioning himself must get some other member to present it. Petitions may be forwarded to members by post; should be read by them before presentation; and, if in breach of any rule of the House, in his opinion or that of the Speaker, returned; when read, it is for the House to permit or forbid their lying on the table, or to reject them.

On presenting the petition, the member may, if he wish, read its prayer and make a general statement as to its source and nature, or the clerk may read it at the table; and, if a present personal grievance, demanding as an urgent necessity immediate remedy, be raised therein, discussion may at once take place. All other petitions, when laid on the table, are referred to the Committee on Public Petitions, and directed, by report made twice a week, to be classified, analysed, and printed, when necessary at length, with details as to their number, objects, and the number of the signatories.

**Peto's Act.**—By this name is popularly known the 13 & 14 Vict. (1850) c. 28, to which, by 55 & 56 Vict. (1892) c. 10, the short title of "The Trustee Appointment Act, 1850," has been given. It relates to the tenure of property by societies for religious and educational purposes, and was intended, as its preamble states, to render more simple and effectual the titles by which congregations or societies, associated together for the purposes of maintaining religious worship or promoting education in England, Wales, and Ireland, may hold the property required for such purposes. In accordance with its provisions, property conveyed for the above-mentioned purposes shall vest without conveyance in the successors in office of retiring or deceased trustees, who shall on their appointment (which must be by deed under hand and seal of the chairman of the meeting of trustees appointing them, executed in presence of such meeting) at once, without further act, step into the shoes of their predecessors (ss. 1, 3). Provision is also made, in the case of copyholds, for the periodical payment of fines in lieu of fines on death and alienation, these being made payable on the first appointment of a new trustee, and thereafter on the expiration of every period of forty years (s. 2). It has been held that a lease for the purpose of a chapel under this Act is a lease for a charitable purpose, which therefore had to be enrolled under the Mortmain Act, 1735, 9 Geo. II. c. 36 (now repealed) (*Bunting v. Sargent*, 1879, 13 Ch. D. 330).

Peto's Act must be read in connection with the Trustees Appointment Act, 1890 (53 & 54 Vict. c. 19), which by sec. 2 extends its application to (1) places for religious worship; (2) the endowment of such places and the ministers thereof; (3) burial-grounds (see also 32 & 33 Vict. (1869) c. 26); (4) places for the education and training of students; (5) schoolhouses



generally (see also 15 & 16 Vict. (1852) c. 49); and (6) residences for ministers, schoolmasters, caretakers, etc., whenever the land is held by trustees in connection with any society or body of persons comprising several congregations associated together for religious purposes. In all the cases above specified the vesting clause of Peto's Act applies (s. 4).

**Petroleum.**—See EXPLOSIVES.

**Petty Bag Office.**—Prior to 1874 an office of this name was attached to the common law jurisdiction of the Court of Chancery for suits for and against solicitors and officers of that Court, and for proceedings relating to statutes, recognisances, writs of *scire facias*, petitions *monstrans de droit*, applications to cancel letters patent, traverses of office and the like. It was distinguished from the Hanaper office (as to which, see 5 & 6 Vict. (1842) c. 103), because the writs and returns to them in Crown matters were in former times preserved in a little sack or bag (*in parvâ bagâ*), whereas writs relating to the business of the subject were originally kept in a hamper or big basket (*in hanaperio*). By the Judicature Act, 1873, 36 & 37 Vict. c. 66, s. 16, the common law jurisdiction of the Court of Chancery was transferred to the High Court of Justice, and by 37 & 38 Vict. (1874) c. 81, s. 5, the office of clerk of the petty bag was abolished. The latter's duties and powers (except such as are by the Solicitors Act, 1888, 51 & 52 Vict. c. 65, directed to be performed by the Incorporated Law Society) are now vested in the senior clerk of the Crown Office Department of the Central Office (R. S. C., 30th January 1889). See further, ERROR, WRIT OF; CROWN OFFICE; PROHIBITION.

**Petty Constables.**—See CONSTABLE.

**Petty Jury.**—See JURY.

**Petty Serjeanty.**—See TENURES.

**Petty Sessional Court** is defined by sec. 13 (11) of the Interpretation Act, 1889 (52 & 53 Vict. c. 63), as a Court of summary jurisdiction, consisting of two or more justices when sitting in a petty sessional court-house, and as including the Lord Mayor of the city of London, and any alderman of that city and any metropolitan or borough police magistrate when sitting at a court-house or place at which he is authorised by law to do alone any act authorised to be done by more than one justice of the peace.

See INFERIOR COURTS, vol. vi. p. 426; MAGISTRATE; METROPOLITAN POLICE DISTRICT; PETTY SESSIONS.

**Petty Sessions.**—1. Besides the general or Quarter Sessions of justices of the peace, which are in theory held before the whole body of justices named in the commission of the peace, there have been established by statute what are termed petty sessions for dealing summarily with offences



and matters not deemed of sufficient importance for the full bench. This jurisdiction seems first to have been given under the statutes as to labourers and vagrants and the poor law. The nature of petty sessions, as distinguished from quarter and special sessions, has already been considered under INFERIOR COURTS, vol. vi. at p. 438. They were instituted to enable justices to deal with minor offences and matters where they arose, and to obviate the need of going to the full bench (see 9 Geo. IV. c. 43, Preamble).

A petty sessional Court is a Court of summary jurisdiction consisting of two or more justices of the peace, or of a borough stipendiary magistrate, or a metropolitan police magistrate, or an alderman of the city of London, to whom jurisdiction is given, or who is authorised to act under the Summary Jurisdiction Acts (*R. v. Whittles*, 1849, 13 Q. B. 248) or any other Act, or under his commission (52 & 53 Vict. c. 63, s. 13). This definition does not include the acts of justices under the Liquor Licensing Laws (*Boulter's case*, [1897] App. Cas. 556), except in certain cases of transfer of licences (5 & 6 Vict. c. 44, ss. 1-3; 33 & 34 Vict. c. 29, s. 4; 35 & 36 Vict. c. 94, s. 41); nor any matter directed to be dealt with in special sessions.

The Court, to be properly constituted, must sit at a petty sessional court-house, *i.e.* a place regularly set apart for the petty or special sessions of the justices, or for the time being appointed as a substitute for it, or at an occasional court-house, *i.e.* a police station or other place previously appointed by the justices to be used as an occasional court-house (1848, c. 43, s. 12; 1879, c. 49, s. 20; 1889, c. 63, s. 13).

Petty sessional Courts are distinct from petty sessional divisions, for the former include any meeting of justices within the limit, and by virtue of their commission to transact such business as they are competent to transact there, which is not a general quarter or special sessions (*R. v. Whittles*, 1849, 13 Q. B. 248, 254). But inasmuch as the justices were not entitled to subdivide themselves according to districts or areas without the assent of the general body, the system of allotted districts or divisions was created in the eighteenth century (*R. v. Deron Justices*, 1818, 1 Barn. & Ald. 588).

Prior to 1828 there does not seem to have been a complete, regular, and consistent system of dividing counties into districts for petty sessions. In that year (9 Geo. IV. c. 43), the Quarter Sessions were empowered to create such districts. The procedure for division is regulated by the Act, subject to a limitation that a new division must not be created which has not at least five resident justices (9 Geo. IV. c. 43, s. 5; 6 & 7 Will. IV. c. 12, s. 2). Divisions once created may not be altered within three years (9 Geo. IV. c. 43, s. 10; 6 & 7 Will. IV. c. 12, s. 1). The limits of divisions created are judicially noticed by Quarter Sessions (*R. v. Whittles*, 1849, 13 Q. B. 548).

In constituting or altering divisions, Quarter Sessions may, if it is convenient, divide parishes, townships, tithings, or places, and make the necessary and incidental changes with reference to parochial officers (22 & 23 Vict. c. 65, ss. 1, 2).

Where a borough has a separate commission of the peace, it is *ipso facto* a petty sessional division (12 & 13 Vict. c. 18, s. 1), in which the borough justices and the county justices have concurrent jurisdiction, unless it has a separate Court of Quarter Sessions, in which event the borough, if exempt from the county justices (under a non-intromittant clause), remains exempt (45 & 46 Vict. c. 50, s. 154; *Buckler v. Wilson*, [1896] 1 Q. B. 83).



The creation of the divisions does not, as a general rule, in any way restrict the right of a petty sessional Court therein sitting to adjudicate on a matter arising in any part of the county, whether it be civil or criminal, and whether in the latter case it is indictable or may be summarily punished (*R. v. Beckley*, 1887, 20 Q. B. D. 187). But in certain instances a matter is cognisable by statute only in the petty sessional division in which it arises or the complainant or defendant is resident.

On the passing of the Local Government Act, 1888, and the creation of the new county of London, the petty sessional divisions in the transferred portions of Middlesex, Surrey, and Kent were left outstanding as divisions of London, but are subject to alteration by the Quarter Sessions of London (51 & 52 Vict. c. 41, s. 42); and petty sessional divisions exist within the area in which unpaid justices act, besides the police Court districts for which police magistrates act. See METROPOLITAN POLICE DISTRICT. Petty sessions for Middlesex, Kent, or Surrey may, if convenient, be held in the county of London (51 & 52 Vict. c. 41, s. 42 (12)).

The provision of justices' rooms or court-houses in boroughs having a separate commission of the peace is in the hands of the town council (12 & 13 Vict. c. 18, s. 2; 45 & 46 Vict. c. 50, s. 160), and in counties is in the hands of the joint committee of the Quarter Sessions and the County Council (51 & 52 Vict. c. 41, ss. 3 (iv.), 30).

The places may be hired or otherwise provided (12 & 13 Vict. c. 18, s. 2). This involves powers (1) to acquire land and erect a proper court-house thereon, and to raise money by loan or otherwise to defray the cost out of the county or borough rate (42 & 43 Vict. c. 49, s. 30); (2) to contract with the treasurer of the local County Court for its use as a petty sessional Court (12 & 13 Vict. c. 18, s. 2).

Counties may (1) combine with other counties or boroughs for hiring or providing court-houses at or near their common boundary at joint expense; or may (2) contract for the use of those belonging to other counties or boroughs which are to be treated as within the jurisdiction of each contracting authority (12 & 13 Vict. c. 18, s. 3; 31 & 32 Vict. c. 22, ss. 5, 8); and see LOCK-UP HOUSE.

2. The jurisdiction of petty sessional Courts may be described as covering the whole of the judicial functions of a Court of summary jurisdiction, with power to do judicial acts as to which a single justice has not jurisdiction. Having regard to *Boulter's* case, [1897] App. Cas. 556, it is not clear whether justices in dealing with indictable offences can now be described as a petty sessional Court; but justices in petty sessions can undoubtedly act under the Indictable Offences Act, 1848. This subject is dealt with as to the distinction between petty and special sessions under INFERIOR COURTS; as to prosecutions, under PROSECUTION; and as to SUMMARY JURISDICTION, under that title.

**Petty Treason.**—See TREASON.

**Pews.**—*Meaning of the Word.*—The word pew is now generally used to mean an enclosed seat in a church. Properly, however, it only means a church seat or stall. Various etymological derivations have been suggested, but none can be considered satisfactory. On this subject, see Heales, *History and Law of Church Seats and Pews*, i. pp. 23–29). In the present article it is proposed to treat the general law as to seats in church.



## HISTORICAL SUMMARY.

In early times churches appear not to have been provided with seats for the congregation. In fact, down to the close of the fourteenth century there do not appear to have been any seats in the naves and aisles of churches. Prior to that time, however, seats were provided in the church for the clergy, the patron of the church, and in some cases for men of noble birth (see Decrees of the Synod of Exeter, 1287, Wilkins, *Concilia*, vol. iv. p. 140). All the inhabitants of a parish had a customary right to attend church; and the view of the law expressed in *Fitzwalter's case*, 1493 (Year-Book Easter Term, 8 Hen. VII. case No. 4, fol. 12), was that the church is common to everyone; and therefore it is not reasonable that one should have his seat and that two shall stand, for no place belongs more to one than another. It however appears, from this case and from other evidence, that there were at this period a few fixed seats in churches, which were held by prescription, which seats may have been fixed. Seats were gradually introduced in the fifteenth and the sixteenth centuries. The seats were for the most part only moveable seats or stools, and any person had a right to remove such seats and stools for his own ease and standing (*Fitzwalter's case*, *supra*). From a historical point of view, it is exceedingly doubtful if the earliest appropriations of seats were ever authorised by authority. The jurisdiction over the fabric of the church belongs to the ordinary, and is therefore subject to ecclesiastical jurisdiction, except in matters involving a claim to a right by prescription. Whatever its origin, however, the Courts have, as already mentioned, recognised from the fifteenth century an exclusive right to a pew or seat in the church on the ground of prescription. From the later part of the sixteenth century the ecclesiastical Courts commenced to grant facilities to persons for permission to erect seats. The earliest instance is met with at Worcester, 1580, and the first in London in 1594. After that date they were frequently granted. They seem originally to have been made to enable persons of position in the parish to build seats for the accommodation of themselves and their families, and to confirm them in the possession of seats which they had erected without authority. No particular system seems to have been observed in making these grants. The idea, however, may be traced in the decisions of the Courts, that vacant spaces in a church might be occupied so long as no person was thereby damnified, that persons should be placed in church according to their social degree, and that seats enjoyed by the former owner of an ancient house should be enjoyed by its present owner. It should be added that the custom of families sitting together in the same pew or seat is a modern introduction. The general custom, down to the middle of the seventeenth century, being for the sexes to sit on different sides of the church. From the time of William III., in churches built under private Acts of Parliament, payment for pews was legalised under certain conditions, and the same principle was partially adopted in churches built under the Church Building Acts (see *post*).

It thus appears that, historically, the rights of the inhabitants of a parish to seats in church are restricted only to rights against them obtained by prescription and rights obtained by faculty.

*Jurisdiction of the Ordinary and Churchwardens in Respect to Seats.*—While all the inhabitants of the parish have the right and are bound to attend church, and are there entitled to be accommodated, the power to appoint in what seats they shall sit rests with the ordinary, at least so far as the nave or body of the church is concerned (as to seats in the aisle and chancel, see articles AISLE; CHANCEL). This jurisdiction he generally exercises through the churchwardens. Excepting in cases of prescription, or where persons are excluded for whom there is standing room (*Taylor v. Timson*, 1888, 20 Q. B. D.), the common law Courts will not interfere with the "placing of the parishioners," as the matter is "merely spiritual" (*Corven's case*, 1604, Coke, pt. 12, 342). It has been stated that in some places the churchwardens can dispose of seats independently of the ordinary, but there does not appear to be any authority for this view (see article CHURCHWARDEN).

In arranging the sittings, it is the duty of the churchwardens, as the officers of the ordinary, to seat all the parishioners, who are entitled to be seated orderly and conveniently. Their main duty is to look to the general accommodation of the parish, consulting, as far as may be, that of all the inhabitants. The parishioners have a claim to be seated according



to their rank and station; but the churchwardens ought not, in providing for this, to overlook the claims of all parishioners to be seated, if sittings can be provided for them. Neither the vestry nor the incumbent have, properly speaking, any right to interfere with the discretion of the churchwardens, who may, however, to a certain extent, reasonably defer to the wishes of both (see judgment of Sir John Nicholl in the Arches Court of Canterbury in *Fuller v. Lane*, 1825, 2 Ad. 419; see also *Blake v. Usborne*, 1832, 3 Hag. 726; *Halliday v. Phillips*, 1884, 23 Q. B. D. 48).

In churches with free seats, churchwardens have authority to direct, for the maintenance of order and decorum, in what parts of the church certain classes of the congregation (*e.g.* boys and girls) may and may not sit (*Asher v. Calcraft*, 1887, 18 Q. B. D. 607).

Every parishioner, as such, has a right to a seat in the parish church, but not necessarily to a pew; and no person who is not a parishioner has any right to a seat in church; and if a parishioner ceases to be such, he loses his right (*In re The Pews of the Cathedral of St. Colun, Londonderry*, 1863, 8 L. T. 861). It would appear from this decision that where cathedrals are parish churches, the ordering of the seats in the nave pertains to the churchwardens; but the matter may be affected by the cathedral statutes. In cathedrals which are not parish churches, the ordinary arranges the seats. No person not excommunicated ought to be excluded from church, who behaves decently (*Walter v. Gunner*, 1798, 1 Hag. Con. 314; Phillimore, *Eccl. Law*, 3rd ed., vol. ii. p. 1424).

A person placed in a particular pew by the churchwardens, or sitting there by their acquiescence, has a right to an action in the ecclesiastical Courts for perturbation of seat against a stranger (*Pettman v. Bridges*, 1811, 1 Phillim. 316); but, apart from seats by prescription or faculties, there is no right on the part of a seatholder to maintain an action against the churchwardens or the ordinary, who may rearrange the sittings as they think fit; and he cannot support a common law action of trespass. Pew rents (except under statute) and the sale of pews are illegal (*Blake v. Usborne*, 3 Hag. Ec. 733; *Fuller v. Lane*, *supra*). The materials in pews which have been taken down belong to the churchwardens, for the benefit of the parish; and the right of bringing an action against a person wrongfully taking away a pew or seat pertains to the churchwardens, and not to the incumbent.

It is the duty of the parishioners to repair the pews in the body of the church.

*Prescription.*—The owner of an ancient messuage may, as has already been stated, claim, by prescription against the ordinary and churchwardens, the right to a seat in the body of the church, as well as in an aisle or chancel (see further, article AISLE; see also article CHANCEL; and CHANCEL in Addenda, vol. xii.); and an inhabitant may, in respect of his house, prescribe to the first, second, or third place in the same seat, which has been repaired by him and those jointly that sit with him in it. If their rights are interfered with by the ordinary, the High Court will interfere by prohibition.

This prescriptive right is, in the eyes of the law, based on a lost faculty, and must be claimed in respect of a house, and not of lands, in the parish (*Pettman v. Bridges*, 1811, 1 Phillim. 316).

It is further necessary to show exclusive user of the pew on the part of the claimant as against the ordinary, inconsistent with mere possession by the permission of the churchwardens. The right to such a pew is subject to the burden of repair; but it is unnecessary to prove actual repair where



evidence is forthcoming of other acts of user or assertion of proprietary right (*Stileman-Gibbard v. Wilkinson*, [1897] 1 Q. B. 759).

The claim to a pew is not an easement, and the Prescription Act 3 & 4 Will. IV. c. 71 does not apply to the claim by prescription to a nave of a pew of a parish church (*Crisp v. Martin*, *supra*); and the question whether a lost grant did, as a matter of fact, exist is one which the Court trying the action must decide (*Proud v. Price*, *supra*).

*Seats by Faculty.*—In practice faculties for seats are now rarely granted by the ordinary. When the Court grants a faculty to appropriate a seat in a church to an inhabitant, it should be a matter of preliminary consideration—(1) Whether such a grant would be prejudicial to the parish; (2) whether it would be prejudicial to the persons opposing the grant; (3) whether the person applying for it is from station and property in the parish qualified to have such a grant.

The form of a faculty is to a man and his family so long as they continue inhabitants of a certain house in the parish. The words “of a certain house” are, however, often omitted. In modern times pews are not annexed by faculty to a house (*Partington v. Rector of Barnes*, 1757, 2 Lev. 345).

On the general subject the following cases should also be referred to:—*Ashly v. Freckleton*, 1683, 3 Lev. 73; *Kenrick v. Taylor*, 1752, 1 Wils. 326; *Crisp v. Martin*, 1876, 2 P. D. 15; *Pettman v. Bridges*, *supra*; *Proud v. Price*, 1893, 68 L. T. 682; *Knapp v. Parishioners of Willesden*, 1851, 2 Rob. Eccl. 358; *Jacob v. Dallow*, 1698, 12 Mod. 233; *Fuller v. Lane*, *supra*; *Woolcomb v. Ouldrige*, 1825, 3 Ad. 1; *Churton v. Frewen*, 1866, L. R. 2 Eq. 634.

*Seats under the Church Building and New Parishes Acts.*—Under the Church Building Acts provision is made for the letting of seats, fixing and recovery of pew rents, for the payment thereof of the minister’s salary, and power given to churchwardens to bring action in their own name, in respect of the same (see 58 Geo. III. c. 45, ss. 63, 73, 75, 76, 77, 78, 79; 59 Geo. III. c. 134, ss. 24, 32; 1 & 2 Will. IV. c. 38, ss. 4, 16, 22). As to these Acts, see Prideaux, *Churchwardens’ Guide*, 16th ed., pp. 301–303. Under the Act 14 & 15 Vict. c. 97, when a permanent provision in land or money has been made for a church for which pew rents have been fixed under any of the Church Building Acts, and when the pew rents have not been appropriated under a local Act, the Commissioners may declare that pew rents shall cease, and the seats will in that case be in the same position as those of an ordinary parish church. Under 19 & 20 Vict. c. 104, s. 5, every person to whom sittings are assigned in a new church shall surrender his rights to sittings in the church of the old parish or ecclesiastical district. Under sec. 6, pew rents may, with consent of bishop, but only if sufficient endowment cannot be provided, be taken for repairs. Under 32 & 33 Vict. c. 74, pews or sittings may be surrendered to the Ecclesiastical Commissioners; see also 35 & 36 Vict. c. 49. A minister of a church built under the Church Building Acts may bring an action for the recovery of his stipend; but the churchwardens are not liable for arrears received by their predecessors (*Lloyd v. Barrup*, 1868, L. R. 4 Ex. 6).

A mortgage by an incumbent of pew rents under the Church Building Acts is void under 13 Eliz. c. 26 (*Ex parte Arrowsmith*, *In re Leveson*, 1878, 8 Ch. D. 96).

[*Authorities.*—Heales’ *History and Law of Church Seats and Pews*; Gibbs. *Cod.*; Watson, *Clergyman’s Law*; Phillimore, *Eccl. Law*, 2nd ed.; Prideaux, *Churchwardens’ Guide*, 16th ed.; Shaw, *Parish Law*.]



**Pharmacy Acts; Pharmacopœia.**—See APOTHECARY; BRITISH PHARMACOPŒIA; CHEMIST; DRUGGIST; MEDICAL PRACTITIONER; MEDICINE STAMPS.

**Pheasants.**—See GAME LAWS.

**Photograph.**—See COPYRIGHT.

**Physician.**—See MEDICAL PRACTITIONER; PHARMACY ACTS.

**Picbage**—A consideration paid to the lord of the soil for the breaking up of ground to set up booths, stalls, or standings in fairs (1 Steph. Com. 664; *R. v. Maydenhead*, 1678, Pal. 76).

**Picture.**—A picture generally consists of three things—first, the canvas on which the picture is painted; secondly, the painting itself, which is painted on the canvas and gives it the value; and thirdly, the frame (Martin, B., *Anderson v. The London and N.-W. Rwy. Co.*, 39 L. J. Ex. 55). Picture and frame are to be considered as one article for purposes of the Carriers Act (11 Geo. IV. and 1 Will. IV. c. 68) (*Anderson v. The London and N.-W. Rwy. Co.*, 39 L. J. Ex. 55; *Henderson v. The London and N.-W. Rwy. Co.*, L. R. 5 Ex. 90). The legal use of the word “painting” is the popular one. Whether artistic designs for hangings, paper for walls, muslins, china, etc., are so exquisitely drawn that they may partake of the character of paintings in the popular sense, in addition to their character as designs in a commercial sense, must be a question for the jury (Hawkins, J., *Woodward v. The London and N.-W. Rwy. Co.*, L. R. 3 Ex. 121). In this case it was held that certain painted carpet and rug patterns and painted carpet designs were not paintings or pictures within the Carriers Act.

Where there is nothing to show to the contrary, pictures will pass as part of the furniture of a house (*Kelly v. Powlet*, Amb. 605). It has been held that by an absolute bequest of all his jewels, trinkets, gold and silver plate, ornamental and other china, and all objects of vertu or taste, the testator did not intend to bequeath his pictures, but that they passed with “the furniture and other effects” (*In re Londesborough*, 50 L. J. Ch. 9).

A picture may be libellous: a statue, a caricature, an effigy, chalk marks on a wall, signs or pictures may constitute a libel (*Monson v. Tussauds Ltd.*, [1894] 1 Q. B. 671; *Austin v. Culpepper*, Skin. 123; *Du Bost v. Beresford*, 2 Camp. 511). In case upon a libel, it is sufficient if the matter is reflecting; as to paint a man playing at cudgels with his wife (Lord Holt, C.J., 11 Mod. 99). See COPYRIGHT.

Where framed pictures are sent by a carrier, the frames as well as the pictures are within the Carriers Act (*Henderson v. London and N.-W. Rwy. Co.*, 1870, L. R. 5 Ex. 90; *Woodward v. London and N.-W. Rwy. Co.*, 1878, 3 Ex. D. 121). The piracy of a picture or engraving by the process of photography, or by any other process, whereby copies may be indefinitely multiplied, is within the Statutes 8 Geo. II. c. 13; 7 Geo. III. c. 38; and 17 Geo. III. c. 57, for the protection of artists and engravers (*Gambart v. Ball*, 1863, 14 C. B. N. S. 306). With respect to pictures as



heirlooms, see *D'Eyncourt v. Gregory*, 1866, L. R. 3 Eq. 382; see also *Treadwin v. G. E. Rwy. Co.*, 1866, 37 L. J. C. P. 83.

**Piecework.**—In contracts creating a relationship of master and servant, remuneration may be stipulated to be paid not only in proportion to the period of service, but also in proportion to the work done. Work done under a contract of the latter kind, by the job or piece, is known as piecework. In general, wages will be due for the work done from time to time (*Warburton v. Heyworth*, 1880, 6 Q. B. D. 1), but there is nothing to prevent a servant agreeing to forfeit such earnings in the event of breaking the contract of service without notice (*Walsh v. Walley*, 1874, L. R. 9 Q. B. 367). Thus where a servant did piecework under rules which fixed the amount due on Thursdays, but made the wages not payable until Saturday, and left off work without notice on a Friday, he was held to have forfeited not only what he had earned since the last Thursday, but also what was due to be paid on the Saturday in respect of the preceding week (*Walsh v. Walley, supra*); but in another case where the facts were similar, except that the servant was held not to have agreed to the booking rule, forfeiture of what had been earned before the last booking was not allowed, the Employers and Workmen Act, 1875, 38 & 39 Vict. c. 90, s. 11, protecting the servant in that case (*Warburton v. Heyworth, supra*). So if a weekly hiring is made out, a servant may be made to forfeit what he has earned, even though paid by the piece, if he leaves off work without notice (*Gregson v. Whittle*, 1876, 34 L. T. N. S. 143). In many cases, therefore, it is a question of importance whether the arrangement is to do piecework or to work by time, for in the former case an action *quantum meruit* will, as a general rule, lie, while in the latter case much will depend upon the terms of the service. If the whole of a piece of work is to be done, it may be a provision in the agreement that remuneration will be dependent upon completion of the piece (see *Green v. Mules*, 1861, 30 L. J. C. P. 343; *Hulle v. Heightman*, 1802, 2 East, 145; *Cutter v. Powell*, 1795, 6 T. R. 320).

**Pie-Poudre, Court of.**—See INFERIOR COURTS.

**Pier.**—The law as to the government of piers generally will be found under HARBOURS. A County Court exercising Admiralty jurisdiction has cognisance of a claim for damage done to a ship by collision with a pier-head, for the Admiralty Court had jurisdiction to entertain such a suit (*The Zeta*, [1893] App. Cas. 468). Where a pier is damaged by the negligent navigation of a ship, the law applicable to the case is that of the country in which the pier is situated; and if that country be a foreign one, an English Court has no jurisdiction, the injury being done to foreign soil, unless it is given jurisdiction by contract between the parties (*The M. Moxham*, 1876, 1 P. D. 107; and see COLLISIONS AT SEA). Where a vessel coming down the Clyde ran into and injured a pier or quay of a ferry belonging to a private owner, and by Act of Parliament the Clyde Navigation Trustees had been authorised to reconstruct the piers of that ferry, and the quays of the ferry were to be repaired . . . and reconstructed by the trustees where such repair or reconstruction was made necessary by their works for deepening the river, and the trustees had reconstructed those piers, and by another Act their undertaking was to consist of the works specified in the former Act (*inter*



*alia*), and thereby authorised to be made and maintained, it was held that this imposed no obligation on the trustees to repair that damage, the ferry not being part of their undertaking (*Clyde Navigation Trustees v. Lord Blantyre*, [1893] App. Cas. 703). In a policy of reinsurance protecting the insured from "risk or loss or damage through collision with . . . harbours or wharves or piers or stages or similar structures," where the vessel insured was driven by the wind and sea against a sloping bank formed outside the breakwater of a harbour by laying down loose boulders in the sea to protect the breakwater, and was totally lost, this was held a loss by collision with a pier or similar structure (*Union M. I. C. v. Borwick*, [1895] 2 Q. B. 279).

**Pigeons.**—See BIRDS, vol. ii. p. 148.

**Pig Market.**—See Diseases of Animals Act, 1894, and *M'Lean v. Monk*, 1898, 77 L. T. 663.

**Pillage.**—See WAR.

**Pillory**—A contrivance for exposing offenders to public scorn, usually consisting of a platform on which was set a wooden post and frame, behind which the offender stood, his head and hands being thrust through and fixed in holes in the frame. It was one of the usual common law punishments from Anglo-Saxon times for misdemeanours, especially cheats and frauds on the public, *e.g.* the sale of unsound food (5 Seld. Soc. Publ. 80), and forestalling and regrating, and during the seventeenth century for political libels and sedition.

The grantee of a franchise to have a court leet or market is said to have been required to provide a pillory and tumbrel for punishment, and the sentence was regarded as involving infamy (3 Co. *Inst.* 219). Sundry statutes extended the punishment to new offences, *e.g.* perjury (5 Eliz. c. 9, s. 7). The pillory was abolished in 1816 (56 Geo. III. c. 138) for all offences except perjury and subornation of perjury, and in 1837 (7 Will. IV. and 1 Vict. c. 23) was wholly abolished. Where, under any statute, pillory was the sole punishment of an offence, fine and imprisonment were substituted in 1816. In the United States it continued till 1839 (Act, Feb. 27, s. 5). The nearest equivalent of this mode of holding up to public odium is the power still existing of placarding on a shop a second conviction of the owner for selling unsound food (54 & 55 Vict. c. 76, s. 47).

## Pilots; Pilotage.

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#### 1. AT COMMON LAW.

A pilot is a person who is taken on board at a particular place for the purpose of conducting a ship through a river, road, or channel, or from or into a port (Abbott, 5th ed., 148). In most of the ports of England, societies



and corporations have long been established, either by charter or local Act of Parliament, for the appointment and control of pilots in particular localities (Maude and Pollock, i. 250); and a list of such pilotage authorities is given in the Appendix (pp. 110-125) of the latter book. For the safety of navigation in many such localities the employment of a pilot is compulsory on all ships or certain classes of ships (see *post*); in such a case a pilot is not the servant of the shipowner of whose vessel he has charge, and the shipowner is not liable for his negligence; but a pilot taken voluntarily by a shipowner or master is in the position of their servant, and makes the shipowner responsible for his negligence (*The Maria*, 1839, 1 Rob. W. 95; *The Eden*, 1846, 2 *ibid.* 442).

A pilot when in charge of a ship has the supreme control over her navigation; thus he decides whether the ship shall proceed from the dock where she is and prosecute her voyage (*Burrell v. M'Brayne*, 1891, 18 Sess. Cas. Sc. (4th) 1048); when she shall get under way (*The Peerless*, 1860, Lush. 30, 32; *The Oakfield*, 1886, 11 P. D. 34); what is the proper time and speed for her to pass through a frequented anchorage (*The Lochlibo*, 1850, 3 Rob. W. 320; 7 Moo. P. C. 427); the time, place, and manner for her to turn when coming out of dock (*The Ocean Wave*, 1870, L. R. 3 P. C. 265); the place or time to anchor (*The Agricola*, 1843, 2 Rob. W. 10); the manner of catting the anchor preparatory to coming to an anchor (*The Gipsy King*, 1847, *ibid.* 537); the way of carrying the anchor (*The Rigsborg Minde*, 1883, P. D. 132, Humber; *The Monte Rosa*, [1893] Prob. 23, Thames); whether, when the ship drags or drives with one anchor down, another should be put down (*The Northampton*, 1853, 1 Spink, 152); the proper orders for the helm (*The Lochlibo*, above, 325); the rate of speed (*The Calabar*, 1868, L. R. 2 P. C. 238); what sail or headgear shall be carried (*The Christiana*, 1850, 7 Moo. P. C. 160); whether the statutory rule of the road should be followed or not (*The Argo*, 1859, Swab. 462); whether a tug shall be taken if the ship is in distress (*The Julia*, 1861, Lush. 224, 226). The master must not interfere with the pilot's authority; and "the commands of the pilot must be implicitly obeyed, for to him belongs the whole conduct of the navigation of the ship, to the safety of which it is important that the chief direction should be vested in one only" (Parke, B., *The Christiana*, above); unless the pilot is drunk, or manifestly incapable for his duty (*ibid.*; Dr. Lushington, *The Lochlibo*, above; *The Peerless*, above). But if there is a clear and plain prospect of danger to the ship in a particular course, it is the duty of the master not to allow it to be adopted, *e.g.* getting under way in a thick fog (*The Girolamo*, 1834, 3 Hag. Adm. 176; *The Oakfield*, 1886, 11 P. D. 34); or he and his owners will be liable for any consequences. The master and owners are also responsible for whether a tug shall be taken where required only for the purpose of accelerating speed (*The Julia*, 1861, Lush. 224); for the trim of the ship which prevents her manœuvring properly (*The Argo*, above); and for the towing of a ship by night from one dock to another, though there is a pilot on board, for he is not responsible under such circumstances (*The Borussia*, 1856, Swab. 94). They are not, however, liable for failure to "stand by" after a collision, if a compulsory pilot is in charge (*The Queen*, 1869, L. R. 2 Ad. & Ec. 354).

The pilot is not in common employment with the master and crew, and the shipowner is therefore liable to him for any injury or damage suffered by him which is due to their negligence (*Smith v. Steele*, 1875, L. R. 10 Q. B. 125). He can sue for his pilotage fee either at common law



or in Admiralty, provided in the latter case that the contract is not made nor the work done within the body of a county (*Ross v. Walker*, 1765, 2 Wils. 264; *The Adah*, 1830, 2 Hag. Adm. 326; and see MARITIME LIEN); and if the claim is exorbitant, or the contract on which it is founded was made under the pressure of necessity, the Admiralty Court awards only what is a reasonable sum for the services rendered (*The Nelson*, 1805, 6 Rob. C. 227, but this is now chiefly governed by statutes, see *post*). He cannot be sued in Admiralty for damage done by a collision caused by his negligence, though he can at common law, and in the Admiralty Division as a Division of the High Court (*R. v. Judge of City of London Court*, [1892] 1 Q. B. 273; *The Octavia Stella*, 1887, 6 Asp. 182); and though, perhaps, he can be joined as a defendant in an action *in rem* against the ship in his charge, the Court in the exercise of its discretion has refused to do so (*The Germanic*, [1896] Prob. 84). A pilotage authority is not liable for the negligence of a pilot licensed by it (*Shaw Savill Albion Co. v. Timaru Local Board*, 1890, 15 App. Cas. 429); but it is liable for the negligence of persons not licensed by it as pilots, but employed by it for stated wages to pilot ships into its harbour, it taking the pilotage dues itself and applying them to harbour purposes (*Holman v. Irvine*, 1877, 4 Sess. Cas. (4th) 406).

A pilot may be entitled to claim salvage from a ship which he has undertaken to pilot, if the services which he renders to her are outside the scope of his contract; but "in order to entitle a pilot to salvage reward he must not only show that the ship was in some sense in distress, but that she was in such distress as to be in danger of being lost, and such as to call upon him to run such unusual danger, or incur such unusual responsibility, or exercise such unusual skill, or perform such an unusual kind of service as to make it unfair and unjust that he should be paid otherwise than upon the terms of salvage reward" (Brett, L.J., *Akerblom v. Price*, 1881, 7 Q. B. D. 129, 135). It is not the test of a pilotage service being salvage that the ship lies damaged or in distress, or that the pilotage involves some hazard, and bringing the ship into safety, but whether the risk attending the services to the vessel was such that the pilot could not be reasonably expected to perform them for ordinary pilotage, or even extraordinary pilotage, reward. "In an extraordinary case it may be difficult to distinguish pilotage from salvage; in general they are distinguishable enough, and the pilot, though he contributes to the safety of the ship, is not to claim as a legal salvor. Pilotage is a hazardous occupation from its nature, but extraordinary rewards cannot be claimed in consequence of the common perils of the employment which pilots have chosen" (Lord Stowell, *The Joseph Harvey*, 1799, 1 Rob. C. 306). "A pilot engaged as such cannot claim as a salvor, for in extraordinary pilot services additional pilotage is the proper rate of reward" (*The Enterprise*, 1828, 2 Hag. Adm. 178). "Persons assuming the character and duties of pilots are only remunerated at the rates of that service and not as salvors" (*The Columbus*, *ibid.*); for "they have an exclusive privilege of service, and are expected in return to be always ready, and are under an obligation to afford their assistance, unless under circumstances of absolute danger to their lives; they are bound to offer their services in all weathers, and if towing is necessary they are bound to perform it, having a claim of compensation for any damage to their boats and loss of labour" (*The General Palmer*, *ibid.* 176). Accordingly it has been held that where a waterman was hired to act as pilot for a vessel in the Downs, and a gale came on, and the vessel drove and her cable had to be slipped, but she was brought in



safety through the Gulf Stream and into Margate Roads, he could not claim salvage, as his services were within the scope of his contract (*The Aeolus*, 1873, L. R. 4 Ad. & Ec. 29); and a pilot on board a ship salved by tugs from a position of danger, who has rendered trifling assistance by helping at the wheel and windlass, is not entitled to salvage (*The Monarch*, 1886, 12 P. D. 5). On the other hand, a pilotage service may be salvage from its outset, or become so by supervening circumstances; thus guidance of a vessel by a person not a pilot, under extraordinary circumstances, whether called pilotage or salvage, rises to the rank of a salvage service (*The Aglaia*, 1888, 13 P. D. 160, 162); so where there are no licensed pilots, a service which would have been only pilotage in the case of a licensed pilot is salvage when voluntarily performed by others (*The Rosehaugh*, 1854, 1 Spink, 267); and it has been laid down that no pilot is bound to go on board a vessel in distress to render service for mere pilotage reward (*The Frederick*, 1838, 1 Rob. W. 16). On certain emergencies occurring which require extraordinary service, a pilot is bound to stay by the ship, but becomes entitled to salvage remuneration and not a mere pilotage fee (*The Saratoga*, 1861, Lush. 318, 321); thus pilots going on board a leaky vessel, and by pumping bringing her into safety, are entitled to salvage (*The Hebe*, 1844, 2 Rob. W. 246); a person going on board a vessel in distress, and piloting her into harbour, is entitled to salvage unless he has contracted to render the services for pilotage reward only (*The Anders Knape*, 1879, 4 P. D. 213, 217); and where a vessel during a heavy storm was being driven towards dangerous sands, her captain being ignorant of the locality, and her loss appearing inevitable, and some pilots, seeing her danger, put to sea at the peril of their lives to assist her, and, being unable to board her owing to the violence of the sea, by leading and signalling guided her into safety, they were held entitled to salvage (*Akerblom v. Price*, 1881, 7 Q. B. D. 129).

For other rights and duties of pilots, see MARINE INSURANCE; SALVAGE; TUG AND TOW; COLLISIONS AT SEA, vol. iii. at p. 106, as to "Narrow Channel."

## 2. BY STATUTE.

The rights and liabilities of pilots are now chiefly governed by statute, and are contained in the Merchant Shipping Act, 1894, which in this respect extends only to the United Kingdom and the Isle of Man, but applies to all ships therein, British or foreign (s. 572).

(1) *Pilotage Authorities*.—Pilots are governed by pilotage authorities, which are bodies and persons authorised to appoint or license pilots, or to fix and alter rates of pilotage, or to exercise any jurisdiction in respect of pilotage (s. 573); but such authorities are controlled by the Board of Trade, as the supreme authority in all matters relating to merchant ships and seamen (s. 713). Any such body which was in existence at the time of the passing of the Act retains its powers and jurisdiction, so far as they are not inconsistent with the Act (s. 574).

The Board of Trade may by provisional order constitute a new pilotage authority in any area where there is none, and extend the limits of an existing authority to include a new area where there is none; and in either case there shall be no compulsory pilotage, and no restriction on the power of duly qualified persons to obtain licences as pilots (s. 575). The Board of Trade may also by provisional order transfer pilotage jurisdiction over a port other than that where the pilotage authority for that port resides or has its place of business, from the pilotage authority to the harbour authority or



other local body exercising local jurisdiction in maritime matters at that port, or to a new pilotage authority (as above), or to the Trinity House, or it may transfer the whole or any part of the jurisdiction of a pilotage authority to a new authority. For the purpose of such transfer the Board may incorporate the body receiving the transfer, if it is new; it may make it a pilotage authority, determine the limits of its district, sanction a scale of pilotage rates therein, determine how far and under what conditions already-licensed pilots shall act under the new authority, sanction the apportionment of pilotage funds belonging to the pilots of the transferring authority between them and the pilots of the receiving authority, and provide compensation or superannuation for officers of the transferring authority not continued in office by the receiving authority (s. 576). The Board may also provisionally order that pilots, and, if it seems expedient, shipowners, shall be directly represented on the pilotage authority of the district, or any committee, or commissioners, or sub-commissioners thereof (s. 577); and that all ships or any classes of ships shall be exempted from compulsory pilotage upon any terms and conditions that the Board may see fit to annex to such exemptions (s. 578). Where pilotage is not compulsory, nor the power of obtaining pilotage licences restricted, the Board may in the same way give to the pilotage authority powers with respect to licences, the amount of pilotage rates, and where the number of pilots is not restricted, the recovery of pilotage rates and the preventing the employment of unqualified pilots; and it may give facilities for enabling duly qualified persons, after examination, to obtain pilot licences (s. 579). These provisional orders are made on written application being made by some person interested in the pilotage or pilotage laws of the district; notice of such application having been made, and its object, must be given in the *Shipping Gazette* and local papers; the application is referred to the pilotage authority for the district for its opinion; and if the Board of Trade, after considering any objections made, makes the order, copies thereof must be sent to the applicant and the pilotage authority; but no such order takes effect till confirmed by Parliament, and for that purpose it must be contained in a public general Bill introduced by the Board into Parliament; and if the order be petitioned against in either House, it is referred to a Select Committee, and the petitioner may appear and oppose as in the case of a private Bill (s. 580).

Pilotage authorities may, by by-law under the Act, exempt any ships or classes of ships from compulsory pilotage, or annex terms and conditions to such exemptions, and revise and extend any such or already existing exemptions as they think fit (s. 581). They may also by by-laws (1) fix the qualifications as regards age, service, skill, character, and otherwise of applicants for pilotage licences; (2) regulate the approval and licensing of pilot boats; (3) provide for the establishment and regulation of companies for supporting such boats, and sharing in their profits; (4) fix the terms and conditions of granting licences to pilots and apprentices, and pilotage certificates for masters and mates; (5) make regulations for the government of licensed pilots and apprentices, and masters and mates holding pilotage certificates granted by that authority, and their good conduct, and appoint punishments for breach of such regulations, by withdrawing and suspending the licence or certificate, or inflicting fines up to £20; (6) fix the rates of remuneration demandable by pilots, and alter the same, but not so as to allow higher rates than certain ones specified in Sched. 21 to the Act in the case of the Trinity House, and in the case of any other pilotage authority than the rates allowed immediately before May 1, 1855 (the



beginning of the 1854 Act); (7) arrange with any other pilotage authority concerning the limits of their respective districts, and the mutual limitation of each other's powers and the privileges of their pilots, or the delegation or surrender of them to a third pilotage authority, as shall be desirable for facilitating navigation and reducing charges on shipping; (8) establish, either alone or in conjunction with other authorities, funds for the relief of infirm or superannuated pilots or their families, and regulate the contributions to and participations in such funds; (9) require masters and mates holding pilotage certificates to contribute to such funds, and make periodical returns to them of the pilotage services they have rendered, but their contributions shall not exceed such proportion of the pilotage dues on their ships as would have been payable if they had had no certificate; (10) provide for special licences being granted for pilotage beyond the limits of the authority's district, but not so that such licensed pilot when outside that district can supersede an unlicensed pilot (s. 582). No such by-law can take effect until published as directed by the Board of Trade, and confirmed by Order in Council (s. 583). An appeal is allowed to the Board of Trade against any regulation or by-law of a pilotage authority in force before May 1, 1855, or not made under the authority of the Act, if brought either (*a*) by the majority of the pilots at the port, or (*b*) the Local Marine Board, or (*c*) if there is no such Board, by any number of persons not less than six, being masters, owners, or insurers of ships; and the Board may revoke, alter, or add to such regulation or by-law as to it may seem just, and its order is conclusive in the matter (s. 584).

Every pilotage authority must make returns to the Board of Trade with regard to (1) by-laws and regulations relating to pilotage, whether made under the Act or not; (2) the names and ages of all pilots and apprentices licensed to act, and all such acting directly or indirectly under it, whether licensed or not; (3) the service for which each is licensed; (4) the rates of pilotage in force, including charges on shipping in respect of pilotage; (5) the total amount received for pilotage, distinguishing between British and foreign ships, and classes of ships; and also the amount paid by outward-going ships before reaching the outer limits of pilotage water, or by inward-bound ships before reaching their port of destination, which have to take two or more pilots, whether licensed by the same or different pilotage authorities; and the numbers of ships of each of the several classes paying such several amounts; (6) the receipts and expenditure of all moneys received in respect of pilotage by the authority or its sub-commissioners; (7) the receipts and expenditure in separate accounts in respect of any pension or superannuation funds administered by the authority. Every pilotage authority must allow the Board of Trade, or any person it appoints, to inspect any of its books or documents relating to the matters of which a return is required; any such returns must be laid without delay by the Board before Parliament; and if any pilotage authority, other than the Trinity House or pilotage sub-commissioners appointed by them under the Act, fails to make a return within a year after the time fixed therefor by the Board, or to comply with the requirements as to inspection, an Order in Council may direct that all the pilotage powers of that authority shall cease or be suspended, and the Trinity House may thereafter or during the suspension exercise all the powers which it is authorised to exercise in a district in which no provision for the appointment of pilots is made by Act of Parliament or Charter, and all the powers of the defaulting authority (s. 585).



*Pilots.*—A pilot is a qualified pilot for the purposes of the Act if duly licensed by any pilotage authority to conduct ships to which he does not belong; every qualified pilot on his appointment receives a licence containing his name, usual abode, and description, and the limits within which he is qualified to act; the licence must be registered with the chief officer of customs at the place nearest to the residence of the pilot, and he cannot act as pilot till this is done; a qualified pilot acting beyond the limits for which his licence qualifies him is an unqualified pilot (s. 586). A qualified pilot is furnished with copies of the statutory and other pilotage provisions for his district, and must produce them to any person employing him on demand, under penalty of £5 (s. 587). When acting as pilot he must be provided with his licence, and produce it to his employer if required, under penalty of £10, and suspension or dismissal (s. 588). He must also produce and deliver it up, if required, to the pilotage authority licensing him, however arbitrarily it be demanded (*Henry v. Newcastle Trin. Ho. Board*, 1858, 8 El. & Bl. 723); and on his death the person into whose hands the licence comes must transmit it to the pilotage authority, under penalty of £10 (s. 589). An unqualified pilot fraudulently using a licence is liable to a fine of £50 (s. 590).

Pilotage dues on a vessel which makes use of the services of a qualified pilot are payable by (a) the owner or master; (b) in the case of pilotage inwards or outwards, the consignees or agents paying or making themselves liable to pay any other charge on account of the ship in the port of arrival or discharge, or any other charge on account of the ship in the port of clearance, respectively; they may be recovered in the same way as fines of like amount under the Act, but not till after they have been previously demanded in writing; any consignee or agent thus made liable for pilotage dues may retain the amount thereof, and that of the expenses to which he has thereby become liable, out of any moneys received by him on account of the ship and belonging to its owner (s. 591). A pilot receiving, or a master offering to pay, a rate for pilotage, whether greater or less, other than the legal rate, is liable to a fine of £10 (s. 592). A pilot who leads a ship from his boat when that ship has no pilot on board, and cannot be boarded by him owing to particular circumstances, is entitled to the full pilotage rate for the distance run, as if he had been on board and in charge of the ship (s. 593). No pilot can, without his consent, except in case of unavoidable necessity, be taken beyond the limits of his district; and if he is so taken he is entitled, in addition to his pilotage dues, to a sum of 10s. 6d. per day, this sum being reckoned from and inclusive of the day on which he passes those limits, and up to and inclusive of the day on which he is returned to the place where he is taken on board, or, if discharged at a distance from that place, such day as will allow him sufficient time to return thereto, and in this case he is entitled to his reasonable travelling expenses (s. 594). This payment is not "pilotage dues" for which shipbrokers are liable under sec. 591 (*Morteo v. Julian*, 1879, 4 C. P. D. 216). The master must on demand declare truly to a qualified pilot, who is in charge of his ship, her draught of water; and if he refuses to do so, or makes or is privy to making a false declaration, he is liable for each offence to a fine not exceeding double the dues payable to the pilot; and if he makes or is privy to making a fraudulent alteration in the marks on the stern or stern-post of the ship denoting the draught of water, he is liable for each offence to a fine up to £500 (s. 595).

An unqualified pilot may in any district take charge of a ship, without subjecting himself or his employer to any penalty, (a) where no qualified



pilot has offered or signalled to take charge of a ship; (b) where a ship is in distress, or under circumstances where the master must take the best available assistance; or (c) for changing the moorings of any ship in port, or docking or undocking her, where this can be done without infringing port regulations or harbour-master's orders (s. 596). He may be superseded by a qualified pilot, but is entitled to have a proportion of the charge payable to the qualified pilot deducted therefrom and given him for his services; and in case of dispute, the pilotage authority for the district decides the proportions due to each (s. 597). An unqualified pilot, whether in a district where pilotage is compulsory or not, who takes or continues in charge of a ship after a qualified pilot has offered to do so, is liable for each offence to a fine of £50, *e.g.* mate acting as pilot of ship after proper pilot has offered (*Turner v. Peat*, 1888, 53 J. P. 230); and a master of a ship in the like case who employs or continues to employ an unqualified pilot after a qualified pilot has offered or signalled to take charge of her, is liable to a fine of double the pilotage demandable from the ship (s. 598). See *post*, p. 89.

A pilotage authority may, on application by a master or mate of any ship, and payment by him of the usual expenses, examine him as to his capacity to pilot any ship of his owner's within its district, and grant him, if competent, a pilotage certificate specifying the name of its holder, the ship or ships for which it is granted, the limits in which it is available, and its date of grant; the holder of such a certificate may pilot such ships within those limits without incurring any penalty for not employing a qualified pilot; and such a certificate is in force for one year, but may be renewed by indorsement under the hand of the proper officer of the pilotage authority (s. 599). If the pilotage authority (a) unreasonably refuse or neglect to examine a master or mate, or (b) unreasonably refuse to grant a certificate after examination, or (c) unfairly or improperly conduct such examination, or (d) impose unfair or improper terms on granting such certificate, or (e) improperly withdraw a pilotage certificate from them, such master or mate may appeal to the Board of Trade; and the Board, if the case requires it, may appoint persons to examine the appellant, and grant him, if found competent, a pilotage certificate, on terms which they think fit, such certificate being in form, duration, and effect the same as one granted by a pilotage authority, and renewable at the discretion of the Board either by themselves or the pilotage authority (s. 600). The Board or a pilotage authority may respectively withdraw any certificate granted by them, for misconduct or incompetency, and it thereby becomes of no effect (s. 601). Fees are payable on the granting and renewal of pilotage certificates of masters and mates, which are fixed either by the pilotage authority, with the consent of the Board of Trade, or by the Board if it grants or renews the certificates; such fees, in the former case, after paying the expenses approved by the Board of such examinations and certificates, go to the Pilots' Superannuation Fund of the port or district, or for the benefit of the pilots thereof, in such way as the pilotage authority thinks best; and in the latter case, after paying expenses, for the benefit of the pilots of the district, in such way as the Board thinks best (s. 602).

(2) *Offences of Pilots*.—The following offences of pilots are specially dealt with by the Act. A pilot—(1) keeping, either directly or indirectly, a public-house or place of public entertainment, or selling, directly or indirectly, wine, spirits, tobacco, or tea; or (2) committing any fraud against the customs and excise laws and revenues; (3) being directly or indirectly concerned in corrupt practices with regard to ships, and their tackle,



furniture, cargoes, crews, or passengers, or persons in distress at sea or by shipwreck, or their property; (4) lending his licence; (5) acting as pilot while suspended, or (6) while drunk; (7) employing on board any ship of which he has charge any boat, anchor, cable, or other store, etc., beyond what is necessary for the service of the ship, in order to increase the expense of pilotage, either for the profit of himself or some other person; (8) refusing or wilfully delaying, when not prevented by illness or other reasonable cause, to take charge of a ship within the limits of his licence, on her signalling for a pilot, or his being required to do so by her owner, master, agent, or consignee, or by any officer of the pilotage authority or chief officer of customs; (9) unnecessarily cutting or slipping (or so causing to be done) any ship's cable; (10) refusing, on request by the master, to take a ship in his charge into any port or place where he is qualified to take her, except on reasonable ground of danger to the ship; (11) quitting a ship in his charge without the consent of the master before performing the service for which he was hired—is liable for each offence to a fine of £100 in addition to damages, and if sharing in or privy to committing any such offence, is liable to suspension and dismissal as well as a fine; and any person sharing in or privy to committing such offence is liable, besides damages, to a fine up to £100 (s. 606). Any pilot in charge of a ship who, by wilful breach or neglect of duty or drunkenness, does anything tending to the immediate loss or destruction or serious damage of the ship, or immediate endangering of the life or limb of any person on board her, or refuses or omits to do anything requisite for him to do for the like objects, is guilty of a misdemeanour, and if qualified is also liable to suspension or dismissal by his pilotage authority (s. 607). Any person who, by wilful misrepresentation of circumstances affecting the safety of a ship, obtains or tries to obtain charge of that ship, and any person sharing in or privy to such offence, is liable, besides damages, to a fine up to £100, and if a qualified pilot, to suspension and dismissal by his pilotage authority (s. 608). Where pilots are represented on the pilotage committee, commissioners, or sub-commissioners, these bodies have the same power to suspend or dismiss, or suspend or revoke, the licences of pilots found guilty of any of these offences as the pilotage authority has (s. 609). A pilot, if aggrieved by suspension or dismissal, or by the suspension or revocation of his licence, or by being fined more than £2, or by his rights in respect of a pilotage fund being prejudiced, may appeal to a judge of County Courts having jurisdiction in the port to which he is licensed, or to a metropolitan police magistrate having jurisdiction there, either of whom hears the appeal with an assessor of nautical and pilotage experience, selected by himself, unless the pilot is a Trinity House pilot, in which case a Brother of the Trinity House sits as assessor, and the assessor may be objected to by either party. The judge or magistrate may confirm, reverse, or modify, by increasing or decreasing the penalty, the decision of the pilotage authority or body, and his decision is final; and the costs of the pilotage authority come out of any fund applicable for its general expenses. Rules of procedure may be made, as regards County Court judges, by the authority in that behalf under the County Courts Act, 1888, and as regards magistrates, by a Secretary of State, but in either case with the concurrence of the Treasury as to fees (s. 610).

(3) *Pilot Boats*.—Pilot boats are boats and ships regularly employed in the pilotage service of a district, and approved and licensed by the pilotage authority; and that authority may, at its discretion, appoint and remove the masters of such boats (s. 611). Every pilot boat must have painted on



her stern the name of her owner and port, and on each bow the number of her licence, and be painted elsewhere black outside, or such colour as the pilotage authority, with the Board's consent, direct; and when afloat she must carry a pilot flag of large size, the upper half being white and the lower half red, at the masthead or some equally conspicuous place. It is the duty of her master to see that the boat complies with these provisions, and that the flag is kept clean and distinct, so as to be easily discernible, and that the names and numbers are not concealed, under penalty for each offence up to £20 (s. 612). A qualified pilot, when carried off in a vessel not in the pilotage service, must exhibit a pilot flag to show that the ship has a qualified pilot on board, and for not doing so, except for a reasonable cause, he is punishable by fine up to £50; and where the master or mate of a ship holds a pilotage certificate, a pilot flag must be shown on board while such officer is on board and the ship is within a district where pilotage is compulsory, or the master is liable to a fine of £20 (s. 613). If a ship or boat, not having a licensed pilot, master, or mate on board, displays a flag so like a pilot flag as to be likely to deceive, the owner or master, unless he can prove that he did not mean to deceive, is liable to a fine for each offence up to £50 (s. 614). Rules may be made by Order in Council with regard to signals to be used by a vessel requiring a pilot, known as pilot signals; a vessel requiring a pilot must use the pilot signals, and if the master of a ship uses or allows to be used any of the pilot signals except for summoning a pilot, he is liable to a fine for each offence up to £20 (s. 615).

(4) *Trinity House*.—The chief pilotage authority is the Trinity House (*q.v.*), the area of its jurisdiction comprising—(1) the London district, which consists of the waters of the Thames and Medway as high as London and Rochester Bridges respectively, and also the sea and channels leading thereto or therefrom as far as Orfordness to the north and Dungeness to the south; (2) the English Channel district, consisting of the seas between Dungeness and the Isle of Wight; (3) the outport districts, comprising any pilotage district for the appointment of pilots within which no particular provision is made by any Act of Parliament or charter; and a local Act applying to a particular port the provisions of the General Pilot Act of 1825, except that the sub-commissioners were to be resident within the port of Ipswich, is not such a "particular provision" (*Hadgraft v. Hewith*, 1875, L. R. 10 Q. B. 350). The Trinity House appoints sub-commissioners (not more than five or less than three) for the examination of pilots in all districts in which it has been used to do so before the Act, and may also, with the consent of Her Majesty in Council, appoint sub-commissioners of any other district in which no particular provision is made by Act of Parliament or charter for the appointment of pilots. Pilotage districts under the authority of sub-commissioners appointed by the Trinity House cannot be extended except with such consent as above, and sub-commissioners appointed by the Trinity House are not pilotage authorities within the meaning of the Act.

The Trinity House, after due examination by itself or its commissioners, appoints and licenses, under its common seal, pilots for the purpose of conducting ships within the districts mentioned above; but may not license a pilot to conduct ships both above and below Gravesend (s. 618).

The following are the chief statutory provisions with regard to the licensing of pilots by the Trinity House, the rates of pilotage (Trinity House), and the Trinity House Pilot Fund; but some of these are subject to alteration by the Trinity House (s. 616).

Subject to alteration by the Trinity House, the names of all Trinity



House pilots must be published by the fixing of a notice at their house specifying the name and usual abode of every such pilot and the limits in which he may act as such, and by transmitting copies thereof to the Commissioners of Customs in London and chief officers of customs at all ports within the limits of that pilot's licence, which must be posted up at the Custom House in London, and the custom house elsewhere. A Trinity House pilot on his appointment must execute a bond for £100, conditioned for due observance by him of the Trinity House regulations and by-laws, free from stamp duty and any charge except the expense of preparing it. A Trinity House licence continues in force up till 31st January next following its date; but may be renewed by indorsement under the hand of the secretary or other proper person on or before 31st January in every year, or any subsequent day (s. 619), but it is in the absolute discretion of the Trinity House whether the certificate shall be renewed or not (*R. v. Trinity House*, 1887, 35 W. R. 835). A Trinity House qualified pilot executing such a bond is not liable for neglect or want of skill beyond the penalty of the bond, and the amount payable to him for pilotage on the voyage in which he was engaged when he became so liable (s. 620). The licence may be revoked or suspended by the Trinity House when and as they think fit (s. 621).

Subject to alteration by the Trinity House, the rates of pilotage in Trinity House districts existing previously to the Act are continued, but the Trinity House may by by-law repeal or relax, as to the whole or part of their district, the statutory provisions restricting the amount of pilotage rates to the legal rate, so far as to allow a lower rate to be taken (s. 626). Subject to any alteration by the Trinity House, foreign ships trading to and from the port of London, and not exempted from pilotage, must pay, in the case of ships inwards, the full amount of pilotage dues for the distance piloted; in the case of ships outwards, the full amount of dues for the distance required by law; payment must be made to the chief officer of customs in the port of London by the master or person in charge of the ship, or consignees or agents paying or making themselves liable to pay any other charge for the ship in the port of London; and such dues are recoverable as other pilotage dues are (see above, s. 591, p. 83) (s. 628). Subject to alteration by the Trinity House, the chief officer of customs on receiving any pilotage due from a foreign ship gives a written receipt therefor, and the ship may be detained in the port of London till that receipt is produced to the proper customs officer there; these dues are then paid over to the Trinity House, which applies them, firstly, in paying the dues which would have been payable to the pilot in charge of her if she had been a British ship, after deducting the poundage due to the Trinity House; secondly, in paying to any unlicensed person who has had charge of the ship in the absence of a licensed pilot such amount as the Trinity House may think proper, but not more than what a licensed pilot would have received, after deducting poundages; and lastly, in paying over to the Trinity House Pilot Fund the residue and deducted poundages (s. 628). In case of a difference between the master and qualified pilot of any ship trading to or from London as to her draught of water, the Trinity House, on application by either party, within twelve hours after the ship's arrival, or at some time before beginning to discharge cargo, and in case of a ship outward bound, before she leaves her moorings, may appoint an officer to measure the ship and settle the difference; and he receives from the person against whom he decides one guinea if the ship be below, and half one guinea if the ship be above, the entrance of the London Docks at Wapping (s. 629).



The Trinity House Pilot Fund, subject to alteration by the Trinity House, receives a poundage of 6d. in the £1 on the pilotage earnings of all Trinity House pilots, and also a sum of three guineas payable on 1st January in every year by persons licensed by the Trinity House to act as pilots in districts not superintended by sub-commissioners, or any part of them. A qualified pilot giving a false account of his earnings, or failing to pay any sum due from him hereunder, is liable for each offence to a fine of double the amount payable, and also, at the discretion of the Board, to suspension or dismissal (s. 630). This fund is chargeable, firstly, with payment of the Trinity House's expenses in performing their pilotage duties, and (subject to alteration by them) is then administered by them for the benefit of pilots licensed by them after 1st October 1853, and incapacitated for their duty by age, infirmity, or accident, and the widows and children of pilots so licensed, or the former only (s. 631).

The Trinity Houses of Hull and Newcastle may also appoint sub-commissioners (not more than seven or less than three) for examining pilots in districts where they have been used to appoint such, and with the consent of Her Majesty in Council may appoint like sub-commissioners for any other district situate within their jurisdiction. A pilotage district under the authority of any sub-commissioners of the above corporations cannot be extended except with the like consent. Sub-commissioners so appointed are not pilotage authorities within the meaning of this Act; and nothing in the Act is to give the pilotage commissioners for Hull or the Humber any new jurisdiction (s. 632).

### 3. COMPULSORY PILOTAGE.

Compulsory pilotage exists in many countries besides the United Kingdom. It is proposed here to deal with compulsory pilotage (1) as existing in the United Kingdom; (2) as existing elsewhere.

(1) *In the United Kingdom.*—Pilotage is compulsory for certain classes of ships in certain areas of the territorial waters of the United Kingdom, either by the general law contained in the Merchant Shipping Act, 1894, or by local laws and charters of certain ports which, with their exceptions, are saved by the general Act.

This "compulsion" has been defined as "liability to pay pilotage dues as a penalty for refusing to take a pilot on board, though the same dues must be paid if the pilot is taken" (Dr. Lushington, *The Maria*, 1839, 1 Rob. W. 105); and this is the test to be applied to the language of either general or local Acts of Parliament or of charters. Where a statute inflicts a penalty for not doing an act, the penalty implies that there is a legal compulsion to do the act in question, and this principle is not affected by the fact that the penalty has a particular destination (Sir R. Phillimore, *The Hibernian*, 1872, 1 Asp. 491 (P. C.), where pilotage was compulsory under a Canadian statute).

As already seen, the Board of Trade has power to exempt by provisional order the masters and owners of all ships or classes of ships from being obliged to employ pilots in any pilotage district or from being obliged to pay for pilots when not employing them in any district or part of a district, and annex any terms and conditions to those exemptions (M. S. A., s. 578); and pilotage authorities also may by by-law (subject to confirmation by Order in Council) exempt the masters of any ships or classes of ships from being compelled to employ qualified pilots, and annex any terms and conditions to those exemptions, and revise or extend any such exemptions or any exemptions existing by virtue of any Act of Parliament, law, charter,



or usage, upon such terms and conditions and in such manner as may appear desirable to the authority (ss. 581 and 583).

The existing general law as to compulsory pilotage is contained in the following provisions of the Merchant Shipping Act, and for convenience in reference, most of the decisions having been upon the older general Act of 1854, it may be mentioned here that sec. 603 of the 1894 Act corresponds to sec. 353 of that of 1854; sec. 604 to sec. 354; sec. 625 to sec. 379; sec. 622 to sec. 376; sec. 633 to sec. 388:—"Subject to any alteration to be made by the Board of Trade or by any pilotage authority, in pursuance of the powers hereinbefore contained, the employment of pilots shall continue to be compulsory in all districts where it was compulsory immediately before the commencement of this Act, but all exemptions from that compulsory pilotage shall continue to be in force. If within a district where pilotage is compulsory, the master of an unexempted ship, after a qualified pilot has offered to take charge of the ship or has made a signal for the purpose, pilots his ship himself without holding the necessary certificate, he shall be liable for each offence to a fine of double the amount of the pilotage dues that will be demanded for the conduct of the ship" (s. 603). The exemptions saved by this section and continuing in force are those contained in the Pilot Act of 1825 (6 Geo. IV. 125), similarly saved by the Merchant Shipping Act of 1854 (s. 353) (*The Earl of Auckland*, 1861, Lush. 164, 387). They are as follows:—

The master of any collier or of any ship or vessel trading to Norway or to the Cattegat or Baltic, or round the North Cape or into the White Sea, on their inward or outward voyages, or of any constant trader inwards from the ports between Boulogne inclusive and the Baltic, all such ships and vessels having British registers and coming up either by the North Channel, but not otherwise, or of any Irish trader using the navigation of the rivers Thames or Medway, or of any ship employed in the regular coasting trade of the kingdom, or of any ship or vessel wholly laden with stone from Guernsey, Jersey, Alderney, Sark, or Man, and being the production thereof; or of any ship or vessel not exceeding sixty tons, and having a British register (and equally foreign ships of that size by Order in Council by s. 60), and any other ship whilst the same is within the limit of the port or place to which she belongs, the same not being a port or place in relation to which particular provision hath heretofore been made by an Act or Acts of Parliament or by any charter or charters for the appointment of pilots, shall and may lawfully conduct or pilot his own ship or vessel when and so long as he shall conduct or pilot the same without the aid or assistance of any unlicensed pilot, or other person or persons than the ordinary crew of the said ship or vessel (s. 59).

[But this exemption in the case of vessels on voyages between any port in Sweden and Norway and the port of London has now ceased (1897, 60 & 61 Vict. c. 61, s. 1); and some of the other cases are provided for by the present Merchant Shipping Act (see s. 625).]

The "clumsy and careless language of this section, namely, in not providing for vessels trading *outwards* to the ports between Boulogne and the Baltic, or for vessels coming inward by the south channels" (Sir R. Phillimore, *The Vesta*, 1882, 7 P. D. 244), was amended by Order in Council of February 18, 1854 (made under the Pilotage Act, 1853), which allowed exemption to "the masters of ships and vessels trading to Norway or to the Cattegat or Baltic or round the North Cape or into the White Sea, when coming up by the south channels; of ships and vessels trading to ports between Boulogne (inclusive) and the Baltic, on their outward passages, and when coming up by the south channels; of ships and vessels passing through the limits of any pilotage district on their voyages from one port to another port and not being bound to any port or place within such limits or anchoring therein." It has been held that the provisions of this section, confirmed by sec. 603 (1) of the present Act, are not limited by the negative



terms of sec. 625, below (s. 379 of the old Act) (*R. v. Stanton*, 1857, 8 El. & Bl. 445, where a Baltic passenger ship was held not bound to employ a pilot), but are overridden by the positive terms of sec. 604 (s. 354 of the old Act) (*The Temora*, 1860, Lush. 17, where an Irish trader carrying passengers was held bound to have a pilot in the Thames). What is "a port or place in relation to which particular provision has been made by Act of Parliament, or by charter, for the appointment of pilots," is illustrated by the cases of *The Killarney* (1861, Lush. 202, port of Goole, governed by special Act); *Tyne Commissioners v. General Steam Navigation Co.* (1866, L. R. 2 Q. B. 65, port of Newcastle-on-Tyne, governed by special Act); *The Hankow* (1879, 4 P. D. 197, port of London, governed by the charter of the Trinity House); *The Ruby* (1890, 15 P. D. 139 and 164, port of Llanelly, governed by local Act).

By sec. 62 of the same Act, a master or mate who is owner or part owner of a ship, and lives at Dover, Deal, or the Isle of Thanet, is allowed to pilot his ship from any of the places aforesaid, up or down the Thames or Medway, or into or out of any port or place in the jurisdiction of the Cinque Ports. Under this section it has been decided that a master piloting his own ship on a foreign voyage, beginning in the port of London, was bound to take a pilot, though he was a part owner and lived in the Isle of Thanet (*Williams v. Newton*, 1845, 14 Mee. & W. 747), and that "from the places aforesaid," means from Dover, Deal, or the Isle of Thanet, and not the places mentioned in the previous sections (*Peake v. Screech*, 1845, 7 Q. B. 603). The Order in Council of 1854, "like the statute to which, so far as it relates to exceptions, it is subsidiary and explanatory, only applies to British vessels and not to foreign ones"; and thus a foreign vessel carrying cargo and passengers from London to ports between Boulogne and the Baltic, is not exempt from having to take a pilot (*The Vesta*, *ante*, and *The Hanna*, 1866, L. R. 1 Ad. & Ec. 291).

The present Merchant Shipping Act further provides that the master of every ship carrying passengers between any place in the British Islands and any other place so situate, shall in pilotage waters employ a qualified pilot, unless he or the mate of his ship holds a pilotage certificate, under penalty of a fine (s. 604); under this section it has been held that Ireland is a "place so situate" (*The Temora*, *ante*). The master or owner of any ship passing through any pilotage district in the United Kingdom on a voyage between two places both situate out of that district, shall be exempted from any obligation to employ a pilot in that district or to pay pilotage rates when not employing a pilot within that district; the exemption under this section shall not apply to ships loading or discharging at any place situate within the district, or at any place situate above the district on the same river or its tributaries (s. 605). Under this section it has been held that the word "loading" does not refer to the taking on board of cargo only, and thus a steamer anchoring in Dartmouth Harbour and taking on board 20 tons of coal, being bound for Newcastle (a place outside the pilotage district) from New York (also outside it), was bound to have a pilot on board (*The Winston*, 1884, 9 P. D. 85, affirming *Sir J. Hannen*, 8 P. D. 176); but it does not include taking up a pilot (*Gregory v. Jones*, 1890, 90 L. T. 42). Pilotage is compulsory within the London district (see *ante*) and the Trinity House outport districts, *e.g.* Falmouth (*The Juno*, 1876, 3 Asp. 217); and the master of any ship (not exempt) navigating in those limits without a qualified pilot or a pilotage certificate is punishable by a fine proportioned to the tonnage of his ship (s. 622). A constant supply of pilots must be provided by the Trinity House at



Dungeness; and ships coming from the westward and bound to the Thames or Medway must take the first pilot that offers, under penalty of a fine equal to twice the pilotage (ss. 623 and 624).

By sec. 625 it is provided that the following ships when not carrying passengers (for what are passengers, see PASSENGERS (SEA), *Definitions*) shall, without prejudice to any general exemption under this part of this Act, be exempted from compulsory pilotage in the London district and in the Trinity House outport districts—(that is to say) (1) ships employed in the coasting trade of the United Kingdom (see COASTER); (2) ships of not more than sixty tons burden; (3) ships trading from any port in Great Britain within the London district or any of the Trinity House outport districts to the port of Brest in France or any port in Europe north and east of Brest, or to the Channel Islands or Isle of Man. (An Order in Council of December 21, 1871, substituted Brest for Boulogne in the 1854 Act; and under the corresponding section (379) of the old Act it was decided that the words “to” Boulogne (now Brest) covered a voyage “from” Boulogne (now Brest) (*The Wesley*, 1861, Lush. 268); but the following subsection now provides this expressly.) There have been several decisions on the meaning of the word “trading” in this section (s. 379 of the old Act); *e.g.* a British ship, which was one of a line of vessels making regular voyages from London to Japan and ports in the East and back to London and thence to ports in Europe north of Boulogne (now Brest) and back to London, and on her return from the East discharged her crew and part of her cargo and then proceeded to Holland with the bulk of her cargo and a crew of runners but without passengers, was held to be a “trader” within this section and exempt from compulsory pilotage (*Courtney v. Cole*, 1887, 19 Q. B. D. 447). A vessel on a voyage from Liverpool to Hamburg and obliged by an accident to put into the Thames for repairs, was held to be exempt under this section (*The Sutherland*, 1887, 12 P. D. 154). A vessel engaged in trading between London, the Bristol Channel, and Venice, landing part of her cargo in London and proceeding thence with it and ballast to Cardiff, and there filling up her cargo and discharging her ballast, was held not to be trading to a port north of Brest, for though Cardiff is a place in Europe north and east of Brest, “Europe” is used in contradistinction to the United Kingdom (*The Winestead*, [1895] Prob. 170, Bruce, J.). And a British ship laden with a general cargo from Rosario and La Plata for Rotterdam with leave to carry cattle to London, which discharged the cattle in London and proceeded with the cargo to Rotterdam, is a ship trading from a port in Great Britain to a port north and east of Brest, and therefore exempt (*The Rutland*, [1897] App. Cas. 333). It was pointed out in *Courtney v. Cole* (*ante*, A. L. Smith, J.), as in this last case, that the word “constant” in connection with “trading” which appears in the Act of 1825, is omitted in the later Acts. The meaning of the word “trading” in connection with vessels was also considered in *Mersey Docks and Harbour Board v. Henderson* (1887, 19 Q. B. D. 123 and 13 App. Cas. 595), where vessels which took in part of their cargo at Glasgow, sailed to Liverpool, and completed their loading there for a port in India without discharging any cargo, were held not to be “trading inwards” under the Mersey Dock Act, 1858; Lord Esher saying, “No business man, in my opinion, would think of saying that a ship which came into Liverpool with a declared intention of not delivering any goods there, and which delivered no goods there, was a ship trading inwards.” (4) Ships trading from the port of Brest or any port in Europe north and east of Brest, or from the Channel Islands or Isle of Man to any port in Great Britain within the said London or Trinity



House outport district. (5) Ships navigating within the limits of the port to which they belong. This is subject to that port not being one "in relation to which any particular provision for the appointment of pilots has been made by Act of Parliament or charter" under sec. 59 of the Act of 1825, *ante* (*The Killarney, ante*; *The Hankow, ante*).

The effect in law of compulsory pilotage is, that "no owner or master of any ship is answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of such ship within any district where the employment of such pilot is compulsory by law" (M. S. A., 1894, s. 633, replacing s. 388 of the Act of 1854); the reason being that the pilot is not the servant of the owner, but an officer imposed by the State and put into control or charge of the ship. All ships, whether foreign or British, are entitled to the benefit of this provision, even apart from its expression in the statute, by the common law of England (*The Maria, ante*, and the *Johanna Stoll*, 1861, Lush. 295, Dr. Lushington; Sir C. Robinson having previously decided to the same effect in *The Christiania*, 1828, 2 Hag. Adm. 183, but Sir J. Nicholl to a contrary effect in *The Girolamo*, 1833, 3 Hag. Adm. 188; so *The Halley*, 1868, L. R. 2 P. C. 193).

In order to make good the shipowner's exemption from liability to compulsory pilotage, three conditions must be satisfied—(a) the pilot must be properly qualified. Thus, if a waterman employed in the foreign vessel at the request of the pilot and steering her by the pilot's order, brings about a collision, the owners are liable (*The General de Caen*, 1855, Swa. Ad. 9); but the fact of the same pilot being employed for fifteen years by a shipowner to pilot his ships is not enough to make his employment voluntary and not compulsory (*The Batavier*, 1845, 2 Rob. W. 407; so *The Hibernian, ante*). A pilot is deemed to be a qualified pilot if duly licensed by any pilotage authority to conduct ships to which he does not belong; and every qualified pilot acting beyond the limits for which he is qualified by his licence is an unqualified pilot (s. 586 (1) and (4)). The qualifications are fixed by the pilotage authorities as confirmed by Order in Council (ss. 582, 583); and there may be several kinds of qualified pilots for the same ships in the same districts, "the qualified pilot who is always capable of acting and the qualified pilot who is liable to be superseded if a better can be obtained" (Bowen, L.J., *The Carl XV.*, [1892] Prob. 332, a case where a pilot of the latter kind was held to satisfy the provisions of sec. 633 (s. 388 of the old Act)); but a pilot of the latter kind is not entitled to displace a disqualified person who is piloting a ship, and the master of the ship is not liable to a penalty for continuing to employ the latter (*Stafford v. Dyer*, [1895] 1 Q. B. 566). (b) The pilot must be in charge of the ship. Whether the pilot is in actual charge of the ship depends on the circumstances of each case, and upon the terms of the regulations of the pilotage authority which apply to the case. In particular, several decisions have been given on the terms of the Mersey Act of 1858 as to the meaning of the "ship proceeding to sea," during which pilotage is compulsory upon her. It has been held that where a vessel left her dock, anchored in the Mersey, and came into collision next day, she being under contract to sail with mails on the following day, but the master was not on board, and her rigging was being set up, she was not "proceeding to sea," and pilotage was not compulsory (*Rodrigues v. Melhuish*, 1854, 24 L. J. Ex. 26); while a ship that left dock and anchored in the Mersey, waiting there in order to be able to cross the bar next morning, was held to be "proceeding to sea" (*The City of Cambridge*, 1874, L. R. 5 P. C. 451). In



another case a ship which had anchored in the river meaning to go to sea next day, but owing to an accident was waiting there in order to have repairs done to her rigging, was held not to be liable to compulsory pilotage (*The Cachapool*, 1881, 7 P. D. 217). Similarly, a question arises as to ships coming into a port and anchoring there, whether they are still "*in itinere* and on their way to their dock," and therefore require a pilot. Under the Mersey Act a vessel has been held to be still in compulsory charge of a pilot where the collision happened two days after her arrival in the river, having come too late to be docked on the day of her arrival, and the weather preventing it next day (*The Princeton*, 1878, 3 P. D. 90); a similar decision was given in *The Johanna Stoll*, *ante*; and from a recent decision it seems that under the Mersey Act in the case of outward bound ships compulsory pilotage does not begin till the ship (if going to a stage from dock) proceeds from the stage to sea, and in the case of inward bound ships compulsory pilotage ceases when the ship (if going to a stage before docking) deviates from her course to her dock (*The Servia v. The Carinthia*, [1898] Prob. 36). (c) The ship must be in a district to which the pilot belongs. Under the Hull Pilot Act, 1832, a schooner bound for a dock while in charge of a pilot who had taken her over, while moored at a pier in the Humber, from another pilot who had brought her in from sea, was held to be in his compulsory charge, only one sum being paid for the services of the two pilots (*The Rigsborg Minde*, 1883, 8 P. D. 132). If the pilot whose duty was compulsory has completed that duty, and is thus *functus officio*, e.g. by mooring a ship in the Mersey which remains there for a considerable time without going into dock, his presence on board will not exempt the shipowners (*The Woburn Abbey*, 3 M. L. C. 240).

"The pilot, however, need not be compulsorily employed at the place where the accident happens, so long as he is compulsorily employed *within the district* where it happens"; thus, where a vessel coming up the Channel to London took a pilot on board at Dungeness, and before reaching Gravesend collided with another vessel owing to the pilot's negligence, it was held that, assuming the port of London (to which the ship belonged) to extend to the place of collision, still as the pilot could not have been taken by the ship for a shorter distance than to Gravesend, and could insist on being carried there and being paid for piloting the ship there, and as (besides the wording of the statute (now s. 633) given above) no relation of master and servant existed between the master and the pilot during the whole transit to Gravesend, the shipowners were therefore not liable (*Gen. Steam N. C. v. British and Colonial Steam N. C.*, 1869, L. R. 4 Ex. 238, Ex. Ch.). This decision has been recently approved and followed by the Court of Appeal in a case with similar circumstances in the Bristol Channel (*The Charlton*, 1895, 8 Asp. 22).

The presence of the pilot on board and being in charge is not, however, enough to save the shipowner's liability where the collision is shown to be due to his fault and that of the crew jointly, or of the latter solely (*The Diana*, 1840, 2 Rob. W. 131; *The Christiana*, 1857, 7 Moo. P. C. 171). If a collision has been caused solely by the fault of a compulsory pilot, subsequent misconduct of the master in not standing by or rendering assistance will not make her owners liable (*The Queen*, 1869, L. R. 2 Ad. & Ec. 354). The burden of proof that the cause of the collision was the fault of a compulsory pilot is *primâ facie* on the owners of the ship in his charge; but if that *primâ facie* case is rebutted, then it is for the plaintiffs to show that the defendants were guilty of some other act of negligence (*Clyde N. C. v. Barclay*, 1876, 1 App. Cas. 790; *The Indus*, 1886, 12 P. D. 49, Lord Esher).



Where both vessels are to blame for the collision, the fact that one was in charge of a compulsory pilot will not prevent the general rule applying that no costs are given on either side (*The Rigsborg Minde, ante*); but where both vessels are to blame, and one was under compulsory pilotage, the owner of the latter may recover a clear moiety of her damage without making any deduction for the other's damage (*The Hector*, 1883, 8 P. D. 218).

(2) *In Foreign Countries*.—Where cases of compulsory pilotage arise in countries outside the territorial waters of the United Kingdom, the defence of the owners, whose ship having been negligently navigated by a compulsory pilot has done damage, must be supported upon the principle of law stated in *The Maria*, above (as the M. S. A. has then no application); and they will only be exempt from liability for damage done by the wrongful navigation of their ships when they are under the charge and control of a pilot compulsorily put on board and in charge and control by the local law. The mere fact of the pilot's presence on board being compulsory is not enough to exempt them; he must, like an English pilot, conduct the navigation, and if he is only "a kind of living chart" (Brett, L.J., in *The Guy Mannering*, below), the owners still remain responsible for the navigation of the ship. Thus pilots compulsorily employed under the French Code in a French river (*The Augusta*, 1886, 6 Asp. 58 and 161), or in the Suez Canal under the Canal Regulations (*The Guy Mannering*, 1882, 7 P. D. 132), or in the Danube under the International Rules of Navigation of the Danube (*The Agnes Otto*, 1887, 12 P. D. 56), are not in control of the ship so as to release the shipowners from responsibility. On the other hand, if the pilot is in control, the shipowners are exempt even though the foreign law governing the place where the damage is done expressly provides that in spite of the owner surrendering the charge of his ship to the pilot, he shall still remain liable to other persons for her negligent navigation (*The Halley, ante*, Belgian law; *The Hibernian, ante*, Canadian statute).

[*Authorities*.—See Abbott, *Shipping*; Marsden, *Collisions*; Temperley, *Merchant Shipping Act*; Williams and Bruce, *Admiralty*; Maude and Pollock, *Shipping*.]

**Pin Money**.—See HUSBAND AND WIFE.

**Pinnage**—Poundage of cattle.

**Piracy (Literary)**.—See COPYRIGHT.

**Pirate; Piracy**.—"The offence of piracy by common law," says Blackstone, "consists in committing those acts of robbery and depredation upon the high seas which, if committed upon land, would have amounted to felony there" (edition of 1770, iv. p. 72).

More recently it has been defined as—

Only a sea term for robbery, piracy being a robbery within the jurisdiction of the Admiralty. If the mariners of any ship shall violently dispossess the master, and afterwards carry away the ship itself, or any of the goods, with a felonious intention, in place where the Lord Admiral hath jurisdiction, this is robbery and piracy—

(*Nix v. Dawson*, 13 St. Tri. 654; confirmed in *A.-G. for Hong Kong v. Kwok-a-Sing*, 1873, L. R. 5 P. C. 179).



"The crime of piracy," says Blackstone again (*ibid.*), . . . "is an offence against the universal law of society; a pirate being, according to Sir Edward Coke, *hostis humani generis*. As, therefore, he has renounced all the benefits of society and government, and has reduced himself afresh to the savage state of nature by declaring war against all mankind, all mankind must declare war against him; so that every community hath a right by the rule of self-defence to inflict that punishment upon him, which every individual would in a state of nature have been otherwise entitled to do, for any invasion of his person or personal property."

Certain persons are statutorily assimilated to pirates.

Thus by 11 Will III. c. 7, 8 Geo. I. c. 24, and 18 Geo. II. c. 30, also, British subjects committing hostilities against British subjects under a commission from a foreign prince, or adhering to an enemy, and persons running away with or hindering defence of ships, and other offenders, are punishable as pirates.

See as to proposals to assimilate the slave trade to piracy, SLAVE TRADE; see also VISIT AND SEARCH.

And as acts of piracy constitute men pirates, rebels and insurgents may be held so, though organised (*The Magellan Pirates*, 1 E. & M. 88).

The Queen's Regulations and Admiralty Instructions contain a special provision as regards armed vessels not having a commission of war or a letter of marque from a foreign *de facto* Government, which commit piratical acts and outrages against the vessels and goods of Her Majesty's subjects, or of the subjects of any foreign Power in amity with Her Majesty.

And they further provide that in the case of an attack by a ship in the possession of insurgents against their own domestic Government, upon ships of war of that Government, upon merchant ships belonging to its subjects, or upon its cities, ports, or people within the territorial limits of their own nation, Her Majesty's ships have no right to interfere, except in the case mentioned in Art. 447 (when the lives or property of British subjects are actually in danger); and in any such case the operation must be restricted to such acts as may be necessary to attain the precise object in view (Art. 450).

A Spanish official decree, dated April 24, 1898, issued in connection with the war with the United States, declares that "captains, masters, and officers of vessels which, as well as two-thirds of their crew, are not American, captured while committing acts of war against Spain, even if they are provided with letters of marque issued by the United States," shall be regarded and judged as pirates with all the rigour of the law (Clause VII.). The provision appears to be borrowed from a notification during the Franco-Mexican war of 1839, by Admiral Baudin, who declared that every privateer sailing under the Mexican flag, of which the captain and two-thirds of the crew were not Mexicans, would be treated as pirates. The right to treat neutral vessels accepting letters of marque as piratical is questionable. In 1854 Lord Clarendon made a proposal to the United States minister to conclude a treaty in this sense (Wharton, *Digest*, s. 385), but the ordinary clause in treaties simply provides that no citizen of either State shall take a commission from a foreign Power to arm privateers against the other. This provision figured in the treaty of 1795 between the United States and Spain. Since the Declaration of Paris (*q.v.*) and its practical adoption by even States which have not subscribed it, the subject has only retained the importance that States not parties to the Declaration choose to give it.



Piracy is dealt with in thirteen different English and British enactments, dating from 1536 to 1878, namely:—

28 Hen. VIII. (1536), c. 15 ; 22 & 23 Car. 2 (1670–71), c. 11 ; 11 Will. III. (1698–99), c. 7 ; 4 Geo. I. (1717–18), c. 11, s. 7 ; 8 Geo. I. (1721–22), c. 24 ; 18 Geo. II. (1744–45), c. 30 ; 12 Geo. III. (1772), c. 20 ; 7 & 8 Geo. IV. (1826–27), c. 28, s. 2 ; 9 Geo. IV. (1827), c. 54, s. 8 ; 7 Will. IV. and 1 Vict. (1837), c. 88, ss. 2–4 ; 5 & 6 Vict. (1842), c. 28, ss. 16–18 ; 13 & 14 Vict. (1850), c. 26 ; 41 & 42 Vict. (1878), c. 73, s. 6.

*Not resisting Pirates* is an offence by a statute still in force of the reign of Charles II. (22 & 23 Car. II. c. 11), whereby the master of any vessel of a burden not less than two hundred tons, and furnished with sixteen guns, is forbidden to yield his cargo to pirates or any force without resistance, on pain of being rendered incapable to take charge of any English vessel afterwards ; and if the ship be released, and anything given by the pirates to the master, such gift and his share of the ship are to go to the owners of the goods. And any ship of less burden or force than before-mentioned is forbidden to yield to a Turkish pirate, not having double her number of guns, without fighting : “an extraordinary instance of the courage and skill,” observes Abbott, “which the Legislature of those times attributed to English seamen, and which the exploits of succeeding generations have so often and so gloriously exemplified.”

By the same statute (s. 7) it is enacted,

That if the mariners or inferior officers of any English ship, laden with goods and merchandises as aforesaid, shall decline or refuse to fight and defend the ship when they shall be thereunto commanded by the master or commander thereof, or shall utter any words to discourage the other mariners from defending the ship, every mariner who shall be found guilty of declining or refusing as aforesaid, shall lose all his wages due to him, together with such goods as he hath in his ship and suffer imprisonment not exceeding the space of six months, and shall during such time be kept to hard labour for his or their maintenance.

“An Act to amend certain Acts relating to the crime of piracy” (1837), 7 Will. IV. and 1 Vict. c. 88, repealed much of the old Acts, and enacted that,

Whosoever with intent to commit, or at the time of or immediately before or immediately after committing the crime of piracy, in respect of any ship or vessel, shall assault with intent to murder any person being on board of or belonging to such ship or vessel, or shall stab, cut, or wound any such person, or unlawfully do any act by which the life of such person may be endangered, shall be guilty of felony, and being convicted thereof shall suffer death as a felon (s. 2).

In the case of every felony punishable under this Act, every principal in the second degree, and every accessory before the fact, shall be punishable with death or otherwise, in the same manner as the principal in the first degree is by this Act punishable ; and every accessory after the fact to any felony punishable under this Act, shall, on conviction, be liable to be imprisoned for any term not exceeding two years (s. 4).

**Pirates, Rovers, and Thieves.**—This is a common exception to the shipowner’s liability in contracts of affreightment, and a peril insured against in the Lloyds’ policy (see MARINE INSURANCE). The word “pirates” includes passengers who mutiny (*Naylor v. Palmer*, 1854, 8 Ex. Rep. 739), and rioters who attack the ship from the shore (*Nesbitt v. Lushington*, 1792, 4 T. R. 783 ; Marine Insurance Bill, 1898, r. 9) ; and “pirates and rovers” include a mutinous crew who carry away the ship (*Brown v. Smith*, 1813, 1 Dowl. P. C. 349). Loss by pirates is also covered by perils of the



seas (*Pickering v. Barclay*, 1648, Sty. 132). "Thieves" does not cover clandestine theft, or a theft committed by any one of the ship's company, crew, or passengers (Marine Insurance Bill, 1898, r. 10); the theft covered by the policy or exception is theft accompanied by violence (*latrocinium*), and not simple theft (*furtum*) (Arnould, 770). "Thieves" only means thieves external to the ship (*Taylor v. Liverpool & G. W. S.S. Co.*, 1874, L. R. 9 Q. B. 546). "Robbers" means not thieves, but robbers by force (Parke, B., *De Rothschild v. Mail Steam Packet Co.*, 1852, 7 Ex. Rep. 735); and "pirates, robbers, and thieves of whatever kind, whether on board or not, or by land or sea," do not cover thefts committed by persons in the service of the ship (*Steinman v. Angier Line*, [1891] 1 Q. B. 619).

**Piscary.**—Common of piscary is a right of taking fish from a stream or pond belonging to another. For the distinction between common of piscary and other rights of fishery, see FISHERIES. The right may be enjoyed by copyholders, by the custom of the manor, but their possession of it does not preclude the lord from enclosing against common of pasture (see *Fawcett v. Strickland*, 1737, Willes, 57; and ESTOVERS). It has been held that in a manor where the right of fishing was possessed by the copyholders, the enfranchisement of a copyhold, accompanied by a release on the part of the lord of all rights of fishing and other rights regarding it, extinguished the right of the lord to make to other copyholders, on their enfranchisement, rights of fishings, and of passing over the land first enfranchised (*Tilbury v. Silva*, 1890, 45 Ch. D. 98). It was provided by sec. 82 of the Copyhold Act, 1841 (4 & 5 Vict. c. 35), that a commutation was not to affect the right to (among other things) piscaries, unless expressly commuted under the Act; but this Act is now repealed by the Copyhold Act, 1894 (57 & 58 Vict. c. 46). An enfranchisement does not, without the express consent in writing of the lord, affect his rights in respect of fishing (Copyhold Act, 1894, s. 23 (1)); the tenant's rights are impliedly defeated when the enfranchisement is effected apart from the Copyhold Acts, remaining unaffected when it is made under those Acts (1894 Act, s. 22; but see *Tilbury v. Silva*, *ubi supra*. See also COMMON; COPYHOLD).

**Pitcairn Island** was occupied in 1780 by mutineers from H.M.S. *Bounty*. It has never been formally recognised as a part of the British Empire, but the inhabitants are visited and assisted from time to time by naval commanders in those waters.

**Pixing the Coin.**—See ASSAY.

**Placard** (Fr. *Plaquant*)—In France it formerly signified a table, wherein laws, orders, etc., were written and hung up; in Holland, an edict or proclamation; it also signifies a writing of safe conduct; with us it is little used, but is mentioned as a licence to use certain games, etc., in the 2 & 3 Phil. & Mary, c. 9, and see 33 Hen. VIII. c. 6 (Toml. *Law Dict.*).

**Place.**—The meaning of the expression "place," or "public place," or "place of public resort," or other similar expression, when it occurs in an



Act of Parliament, depends upon the context, and upon the scope and object of the statute.

The Vagrant Act, 1825 (5 Geo. IV. c. 83), by sec. 4 provides, *inter alia*, that every person wilfully exposing to view, in any street, road, highway, or *public place*, any obscene print, picture, or other indecent exhibition; every person wilfully, openly, and obscenely exposing his person in any street, road, or public highway, or in view thereof, or in any *place of public resort*, with intent to insult any female; every person playing or betting in any street, road, highway, or other *open and public place*, at or with any table or instrument of gaming, or at any game or pretended game of chance; and every suspected person or reputed thief frequenting any street, etc., or any *place of public resort, etc.*, with intent to commit a felony, shall be deemed a rogue and vagabond. And the Vagrancy Amendment Act, 1873 (36 & 37 Vict. c. 38, s. 3), further provides that every person playing or betting by way of wagering or gaming in any street, road, highway, or other *open and public place*, or in any *open place to which the public have or are permitted to have access*, at or with any table or instrument of gaming, etc., shall be deemed a rogue and vagabond.

A railway carriage is an "open and public place" within the meaning of the above sections, if, at the time when the offence is committed, it is travelling on its journey or being used for the conveyance of passengers, but not otherwise (*Langrish v. Archer*, 1882, 10 Q. B. D. 44; *Ex parte Freestone*, 1856, 25 L. J. M. C. 121). And a field which is private property, but where strangers are allowed to come and play, and are not turned away nor interfered with by the owner, is an "open place to which the public are permitted to have access" within the meaning of sec. 3 of the Act of 1873 (*Turnbull v. Appleton*, 1881, 45 J. P. 469). So, a private house in which a sale by public auction is held, is for the time being a "place of public resort" within the meaning of that part of sec. 4 of the Act of 1825 which deals with "frequenting" by suspected persons; and so is the platform of a railway station (*Sewell v. Taylor*, 1859, 29 L. J. M. C. 90; *Ex parte Davis*, 1857, 26 L. J. M. C. 178).

With regard to indecent exposure, any place to which the public are in the habit of resorting without being interfered with, though they have no legal right to do so, is a "public place" in which it is a misdemeanour at common law for any person to indecently expose himself to others (*R. v. Wellard*, 1884, 14 Q. B. D. 63); and so is any place (*e.g.* the roof at the back of a house) which, though not open to the public, is open to the view of a great number of persons (*R. v. Thallman*, 1863, 33 L. J. M. C. 58; see also *R. v. Saunders*, 1875, L. R. 1 Q. B. 15). So, a urinal, built in compartments, at the side of a public footpath, and to which all persons passing along have the right to resort, is a "public place," so as to make an act of indecency committed therein, and witnessed by two persons, an indictable nuisance at common law (*R. v. Harris*, 1871, 40 L. J. M. C. 67; and see *R. v. Holmes*, 1853, 22 L. J. M. C. 122, where an omnibus was held to be a "public place" for the same purpose).

On the other hand, it has been held that a booth theatre, which is taken to pieces and carried from place to place, is not a house or other "place of resort" within the meaning of sec. 2 of the Act of 6 & 7 Vict. c. 68, prohibiting the keeping of any house or other place of public resort for the public performance of stage plays, etc., without a licence (*Davys v. Douglas*, 1859, 4 H. & N. 180), though such a theatre is a "place" within the meaning of sec. 11 of the same Act, which imposes a penalty on every person who



for hire acts or presents any part in any stage play, in any place not being a licensed theatre (*Fredericks v. Payne*, 1862, 32 L. J. M. C. 14; *Tarling v. Fredericks*, 1873, 21 W. R. 785).

A room to which persons paying for tickets are admitted for the purpose of witnessing a dramatic entertainment, is for the time being a "place of dramatic entertainment" within the meaning of secs. 1 and 2 of the Act of 3 & 4 Will. IV. c. 15, though such room is ordinarily used for different purposes; the object of the Act being to secure to the author of any dramatic piece the sole right to represent or authorise the representation thereof at any place of public entertainment (*Russell v. Smith*, 1848, 12 Ad. & E. N. S. 217). But where a dramatic piece was represented in a room of a hospital, for the entertainment of the nurses, attendants, and others connected with the hospital, who were admitted free of charge, it was held that such room was not a "place of dramatic entertainment" within the meaning of the sections (*Duck v. Bates*, 1884, 13 Q. B. D. 843).

The word "place" in sec. 17 (2) of London Hackney Carriage Act, 1853, means any place to which the driver of a hackney carriage is required by a fare to drive, where he can gain admittance, even though such place may be private property, as, for instance, a railway station (*Ex parte Kippins*, [1897] 1 Q. B. 1).

In *Daly v. Webb*, 1869, 4 Ir. Com. L. 309, it was held that diseased meat in a cart passing along a street was "deposited in a place" within the meaning of sec. 2 of the 26 & 27 Vict. c. 117; and in *Young v. Gattridge*, 1868, L. R. 4 Q. B. 166, that a yard at the back of a butcher's house was an "other place" within the meaning of sec. 3 of the same statute, which imposed a penalty for preventing an inspector of nuisances from entering any slaughter-house, shop, building, market or other place where any carcass, etc., was kept for sale or preparation for sale.

As to what is "a place" within the meaning of the Betting Houses Act, see BETTING HOUSE.

**Place of Abode.**—In the Act of 5 & 6 Will. IV. c. 76, which requires that on an election of borough councillors the voting papers shall state the place of abode of the voter, the expression "place of abode" means place of residence; and the place of business of a voter, if he does not reside there, is not his place of abode within the meaning of the Act, even if he is better known by his place of business (*R. v. Hammond*, 1852, 17 Ad. & E. N. S. 772). On the other hand, a notice of action to justices under the Act of 24 Geo. II. c. 44, s. 1, is sufficiently indorsed with "the name and place of abode of the attorney" within the meaning of the section, if it is indorsed with his name and place of business, though he resides elsewhere (*Roberts v. Williams*, 1835, 2 C. M. & R. 561).

A person may have two places of abode within the meaning of sec. 7 of the Act of 6 Vict. c. 18, and may state either of them in a notice of objection delivered pursuant to that section. Whether a house occupied by an objector, and which he uses occasionally, is or is not his place of abode within the meaning of the section, is a question of fact rather than of law (*Courtis v. Blight*, 1861, 31 L. J. C. P. 48; *Sheldon v. Fletcher*, 1847, 5 C. B. 17).

As to the meaning of the expression "last place of abode" in sec. 3 of the Act of 7 & 8 Vict. c. 101, and in sec. 7 of the 12 & 13 Vict. c. 45, see *R. v. Evans*, 1850, 19 L. J. M. C. 151; *R. v. Damarell*, 1867, L. R. 3 Q. B.



50 ; *R. v. Brown*, 1859, 24 J. P. 5 ; *R. v. Higham*, 1857, 26 L. J. M. C. 116 ; and LAST PLACE OF ABODE).

**Place of Dramatic Entertainment.**—See PLACE.

**Place of Profit.**—See OFFICE OF PROFIT.

**Place of Public Resort.**—See PLACE.

**Place of Trial.**—See TRIAL.

**Plague.**—See DISEASE ; EPIDEMIC ; INFECTIOUS DISEASES ; PUBLIC HEALTH.

**Plaint.**—See COUNTY COURTS ; MAYOR'S COURT.

**Plan.**—In the Copyright Act, 1842, 5 & 6 Vict. c. 45, s. 2, the word is found associated with “map” and “chart,” and in the London Building Act, 1894, 57 & 58 Vict. c. 213, and by-laws thereunder, it is found associated with “drawing” and “section.” As distinguished from a map or chart, the term “plan” is usually confined to a portion of a city or town, a group of streets, houses, or buildings, or one of these taken separately, a garden, a vessel, etc. Like a drawing, it implies some amount of delineation or design, and it is different from a section, which is rather a magnified drawing of a portion of the subject-matter of a plan. At the same time, the above words are often used as if synonymous, and it is not uncommon to find attached to a deed, and referred to therein as a plan, a map delineating the boundaries of land conveyed. A drawing of the nature of a plan must be upon paper, linen, or other similar substance, and its object generally is to define the position and relative proportions of the different parts of the subject of which it is a design.

Whether a drawing is a plan within the meaning of a statute, or other legal instrument, will depend upon the circumstances of each case. Thus a cardboard pattern sleeve, containing upon it scales, figures, and descriptive words for adapting it to sleeves of any dimensions, was held not to be a “map, chart, or plan” within the Copyright Act, 1842, *supra* (*Hollinrake v. Truswell*, [1894] 3 Ch. 420). And under the by-laws relating to buildings, etc., in the metropolis, stringent regulations are laid down as to the plans required. Thus of the regulations published by the London County Council under the London Building Act, 1894, *supra*, of date 23rd November 1894, No. 2 is headed “Particulars as to Drawings required in each Case.” For new streets, plans are to be to the scale of 88 feet to the inch, and are to be accompanied by longitudinal sections to the same horizontal scale, but to a vertical scale of 11 feet to the inch, and by cross sections to a scale of 22 feet to the inch. For buildings, plans are to be to the scale of 22 feet to the inch, and are to show the situation of the building in relation to others adjacent, and its height and precise dis-



tance from the centre of the roadway. As to spaces at the rear of domestic buildings and open spaces about working-class dwellings not on the public way, the plans are to be one-eighth of an inch to the foot, and are to show the height of the proposed building in every part, and are to be accompanied by a block plan to the scale of 22 feet to the inch, showing the adjoining premises. Plans of furnace chimney shafts, projections, and temporary or wooden structures are also to be to a scale of one-eighth of an inch to the foot, and in most of these cases block plans to a scale of 22 feet to the inch must be furnished. Plans of sewerage must also be submitted and approved (see Metropolis Management Amendment Act, 1890, 53 & 54 Vict. c. 66, s. 4). In all cases the Council's approval is signified in writing under the hand of the superintending architect, and the plans submitted become, on delivery to the district surveyor, the property of the Council (London Building Act, 1894, *supra*, ss. 195, 194). Approval may be refused on sufficient grounds (s. 9); but there is provision for appeal, in which case the documents to be lodged must include copies in duplicate on tracing linen of all plans and drawings (see Regulations issued by the Lord Chancellor under sec. 184). As to buildings and structures in the provinces, see the Public Health Act, 1875, 38 & 39 Vict. c. 55, ss. 157, 158, and the Public Health Amendment Act, 1890, 53 & 54 Vict. c. 59, s. 23.

As to what is a sufficient plan, it was held that the plan to be submitted to a local authority of works to be done must not merely show method or manner, but be the equivalent of a map, so as to enable the authority to judge whether the proposal should be approved, *e.g.* under the Waterworks Clauses Act, 1847, 10 & 11 Vict. c. 17, s. 31, the position and depth of proposed pipes ought to form part of the plan (*Edgeware v. Colne Valley Water Co.*, 1877, W. N. 154), and the plan ought to show the mode in which the underground work is intended to be executed (*East Molesey Local Board v. Lambeth Waterworks Co.*, [1892] 3 Ch. 289). But a rural district council was held not entitled to reject building plans solely because they did not disclose a complete system of sewerage (*R. v. Tyne-mouth Rural District Council*, [1896] 2 Q. B. 451). And if plans have been approved and works have been executed under them, the fact that the compensation offered has not been accepted will not entitle a local board subsequently to alter their approval (*Masters v. Pontypool Local Government Board*, 1878, 9 Ch. D. 677). A person depositing plans cannot, after such deposit, substantially alter them, even though there is no by-law to the contrary (*James v. Masters*, [1893] 1 Q. B. 355). When buildings have been erected according to plans approved by a local board, there is no right of action in the owner of houses opposite for an alleged encroachment upon a street, either in name of the Attorney-General against the local board or against the alleged trespasser (*A.-G. v. Pudsey Local Board*, 1895, 59 J. P. 329).

If a plan is referred to in a deed by way of description, the effect will generally be to incorporate it as part of the deed (*Nene Valley Drainage Commissioners v. Dunkley*, 1876, 4 Ch. D. 1), and so, if an Act directs compliance with deposited plans and sections, they will be regarded as embodied in the statute (*Edinburgh Street Tramways Co. v. Black*, 1873, L. R. 2 H. L. Sc. 336). Though the plan is hardly quite specific, it will have to be carried out according to the presumed intention of the parties (*Compton v. Richards*, 1814, 1 Price, 27). Care should therefore be taken to make plans as exact as possible, and if, on a sale, a purchaser is misled, through some material mistake in the plan of the estate sold, and there is



nothing from which constructive notice can be inferred, the contract will not be enforced against him (*Denny v. Hancock*, 1870, L. R. 6 Ch. 1; cp. *Hunter v. Walters*, *Curling v. Walters*, *Darnell v. Hunter*, 1871, L. R. 7 Ch. 75). A plan may even be read along with a deed in which there is no reference to it, if it appears that the intention of the parties was that it should be treated as part of the transaction, as, for example, where the plan is indorsed "plan of property sold to and purchased by D., 23rd October 1874. N.B.—The property included in the purchase is edged with red colour" (*Nene Valley Drainage Commissioners v. Dunkley*, *supra*).

Old maps, plans, etc., are frequently admissible as evidence against, though not, as a rule, for, persons claiming under former proprietors (cp. *R. v. Milton Inhabitants*, 1843, 1 Car. & Kir. 58). Generally speaking, however, they are only of use as supplementary to parol evidence. In the latter case, if found useful, the costs thereof on the higher scale may be allowed (*The Robin*, [1892] Prob. 95). Should the issue depend much on the state of the plans, but, through the ignorance of one of the parties, they are useless without the aid of an expert, an order may be made for inspection by a surveyor on that party's behalf (*Swansea Vale Rwy. Co. v. Budd*, 1866, L. R. 2 Eq. 274).

As to plans acted upon by railway companies, mere technical objections will not be allowed (*A.-G. v. Great Eastern Rwy. Co.*, 1873, L. R. 6 H. L. 367); but if the land in respect of which an objection is raised is not included in the plans, or if an attempt is made to get the land for totally different purposes from those in respect of which the plans were approved, an injunction will issue (*Lamb v. North London Rwy. Co.*, 1869, L. R. 4 Ch. 522). Though plans are presented, there is no implied warranty that the works proposed can be successfully executed, so as to render the contractor liable in damages (*Thorn v. Mayor and Commonalty of London*, 1876, 1 App. Cas. 120).

**Plant.**—The term "plant" indicates primarily materials or instruments which are used for the purpose of carrying on a business, and without which such business cannot be carried on (per Lord Esher in *Yarmouth v. France*, 1887, 19 Q. B. D. 647). So it will include the fixtures, tools, apparatus, and machinery necessary for that purpose, though not the stock-in-trade or household furniture and effects of the ordinary kind (*Blake v. Shaw*, 1860, 8 W. R. 410). It does not seem confined, as some dictionaries put it, to mechanical trades; and where a bequest was worded to be of "the goodwill of my business in A. Street and also the plant," the leasehold premises used solely for business purposes were held to pass (*Blake v. Shaw*, *supra*).

Special meanings may, however, be applied to it, either expressly or impliedly from the circumstances of its usage. Thus in the Bills of Sale Act, 1882, 45 & 46 Vict. c. 43, s. 6, subs. 2, the word "plant" is associated with trade machinery, and further qualified by the words "used in, attached to, or brought upon any land, farm, factory, workshop, shop, house, warehouse, or any other place in substitution for any of the like plant." Under that section, horses not used for business purposes, though on the premises, were held not to be plant, the judges, however, carefully refraining from saying that they might not be plant in other cases (*London and Eastern Counties Loan and Discount Co. v. Creasy*, [1897] 1 Q. B. 768). So, under the Employers Liability Act, 1880, 43 & 44 Vict. c. 42, ss. 1 (1) and 2 (1),



where the words are "plant used in the business," it was said that horses, carts, waggons, etc., might form a material part of the plant (*Yarmouth v. France, supra*). A ladder used to support scaffolding, though that is not its proper use, is part of the plant in respect of a defect in which an action will lie under these sections (*Cripps v. Judge*, 1884, 13 Q. B. D. 583).

**Plantation.**—This term implies a wood of some description, generally of young trees, as distinguished from a forest or collection of timber trees. The latter term includes trees of upwards of twenty years' growth (*Aubrey v. Fisher*, 1809, 10 East, 446; *Brook v. Rogers*, 1604, Cro. (2) 100; and see **TIMBER**). The term, however, is frequently found in the wider sense of a wood generally, as when "ornamental plantations" are spoken of (see *Shotts Iron Co. v. Inglis*, 1882, 7 App. Cas. 518). A more definite distinction is drawn between plantations and coppice woods or underwoods. Thus in the Rating Act, 1874, 37 & 38 Vict. c. 54, s. 4, plantations, woods, and lands used for the growth of saleable underwood are separately mentioned, and it is enacted that if land is used for a plantation or wood it shall be rated as if let and occupied in its natural and unimproved state, but if land is used for the growth of saleable underwood it shall be rated as if let for that purpose; while if both purposes are found combined, the Assessment Committee may rate it either as a plantation or wood, or as land used for the growth of underwood (see **UNDERWOOD**). What is a plantation? will be a question of fact in every case, depending, like the term "saleable underwood," on the mode or object of cultivation (cp. *Lord Fitzhardinge v. Pritchett*, 1867, L. R. 2 Q. B. 135; *R. v. Narberth*, 1839, 9 Ad. & E. 815; *R. v. Ferrybridge*, 1823, 1 Barn. & Cress. 375). A devise of a West India plantation will, it seems, pass also the stock, implements, utensils, etc., upon it (*Lushington v. Sewell*, 1827, 1 Sim. 435).

**Plantations Abroad.**—See **BOARD OF TRADE**; **COLONY**.

**Plants.**—As to larceny of, or injury to plants, see vol. vii. p. 310; vol. viii. p. 83.

See also sec. 52 of the Malicious Damage Act, 1861, as to damage generally to real or personal property, which section will apply in case the damage is less than one shilling. The Act, however, does not apply to uncultivated plants, such as mushrooms growing spontaneously (*Gardner v. Mansbridge*, 1887, 19 Q. B. D. 217), or grass (*Eley v. Lytle*, 1885, 50 J. P. 308). But see sec. 16 as to furze, heath, etc. Express malice need not be proved, for want of reasonable grounds for supposing a right to do the act complained of will be sufficient (*White v. Feast*, 1872, L. R. 7 Q. B. 353).

**Plate.**—1. *Hall Marks on Gold and Silver Goods.*—The regulations as to the marking of gold and silver plate, and the penalties (7 & 8 Vict. c. 22) for offences in relation thereto, are contained in a great number of statutes (see the Index to the Statutes, *Plate*). The following are the more important provisions:—Gold and silver goods must be marked with the *initials* of the worker (12 Geo. II. c. 26, s. 5), and the *assay mark* of the town where they were made, or (if not made in an



assay town) where they were marked (2 Hen. VI. c. 17, London; 12 & 13 Will. III. c. 4, York (now discontinued), Exeter, Bristol (never used), Chester and Norwich (now discontinued); 1 Anne, c. 3, Newcastle-on-Tyne; 13 Geo. III. c. 52, Sheffield; 5 Geo. IV. c. 11, s. 1, *local*, Birmingham), and also the *variable* or date mark to show the year of marking (12 & 13 Will. III. c. 4, s. 3; 12 Geo. II. c. 26, s. 5). The variable mark is a letter. In addition, there must be marked on gold wares of 22 or 18 carats' fineness, the *standard* or quality marks of a crown and 22 (7 & 8 Vict. c. 22, s. 15), or a crown and 18 (38 Geo. III. c. 69, s. 2) respectively; and on silver wares of 11 oz. 10 dwts., and 11 oz. 2 dwts. fineness, the standard marks of Britannia, and a lion *passant* respectively (6 Geo. I. c. 11, s. 41; 12 Geo. II. c. 26). Before the abolition of the duty on plate (53 Vict. c. 8, s. 10) a *duty* mark must also have been added to 22 or 18 carat gold, and to silver goods. It was the king's head (24 Geo. III. sess. 2, c. 53, s. 5).

2. *Exemptions*.—A number of small articles are exempted from marking, viz. chains, necklace beads, lockets, filigree work, shirt buckles or brooches, stamped medals, and spouts to china teapots, of any weight; tippings, swages, or mounts, not exceeding 10 dwts. of silver each, except only necks and collars for caistors, cruets, or glasses appertaining to any sort of stands or frames; silver goods not weighing 5 dwts., except neck collars and tops for caistors, cruets or glasses appertaining to any sort of stands or frames, buttons to be affixed or set on any wearing apparel, solid sleeve buttons, and solid studs, not having a bissiled edge soldered on, wrought seals, blank seals, bottle-tickets, shoe-clasps, patch-boxes, salt-spoons, tea-spoons, tea strainers, buckles (the shirt buckles or brooches before mentioned excepted), and pieces to garnish cabinets, or knife-cases, or tea-chests, or bridles, or stands, or frames (30 Geo. III. c. 31). See also below, 5.

3. *Gold wedding-rings* are to be marked as gold plate (18 & 19 Vict. c. 60).

4. *Fineness*.—Before 1854 gold wares were required to be of either 22 or 18 carats' fineness (38 Geo. III. c. 69). By an Act of that year (17 & 18 Vict. c. 96) any other standards for gold plate, not being less than one-third part of the whole in fine gold, may be authorised by Order in Council. The Order may specify any instrument for stamping or marking the wares, setting forth in figures the actual fineness thereof according to the standard declared. Under this Act, the 9, 12, and 15 carat gold standards have been introduced.

Silver wares must be of the standard of 11 ozs. 10 dwts., or 11 ozs. 2 dwts. of silver to the pound troy (6 Geo. I. c. 11).

5. *Foreign Plate*.—Imported foreign plate, not being battered, except ornamental plate made before 1800 (5 & 6 Vict. c. 56, s. 6), must be of a recognised standard fineness, and must be assayed and marked as English plate is (5 & 6 Vict. c. 47, s. 59; 46 & 47 Vict. c. 55, s. 10), and with the letter F (39 & 40 Vict. c. 35, s. 2). But articles which, in the opinion of the Commissioners of Customs, are hand-chased, inlaid, bronzed, or filigree work of Oriental pattern, are exempt from assay (47 & 48 Vict. c. 62, s. 4).

Foreign watch-cases stamped at an assay office in the United Kingdom are marked with the word *foreign* and a cross-shaped (for gold) or octagon-shaped (for silver) shield (Merchandise Marks Act, 1887, s. 8; Order in Council, 28th November 1887).

6. *Plated Goods*.—Makers of plated goods in Sheffield, or within one hundred miles thereof, are authorised to strike on the goods their surnames, or the names of their firm, with a mark (not being an imitation of



an assay mark), which is approved by the guardians of the Assay Office and registered (24 Geo. III. sess. 2, c. 20, ss. 2, 3).

7. *Licences* are required for trading, selling, taking in pawn, or refining gold or silver, except lace, wire, thread, or fringe (30 & 31 Vict. c. 90; 51 & 52 Vict. c. 8, s. 9 (2); see EXCISE, vol. v. p. 119).

8. *Weight*.—Sales must be by the ounce troy (41 & 42 Vict. c. 49, s. 20).

9. *Legacy Duty*.—As to exemption from this, see vol. iv. p. 124.

[*Authorities*.—Summaries of the statutes relating to plate marks are given in Safford on *Merchandise Marks*, and Sebastian on *Trade Marks*. See also WATCHES.]

**Play-debt.**—See GAMING (AND WAGERING).

**Play-grounds.**—See OPEN SPACES; PLEASURE GROUNDS.

**Plea.**—The various legal senses in which this term is used will be found dealt with under such headings as ABATEMENT; BAR, PLEA IN; DEMURRER; DILATORY PLEA; JUSTIFICATION; PLEADING.

## Pleading; Pleadings.

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*Before the Judicature Acts.*—(a) *Common Law.*—Pleadings were formerly made *vivâ voce* in the presence of the judges (Bacon's *Abr.* "Pleas and Pleadings," 6th ed., vol. v. p. 321; Stephen on *Pleading*, 7th ed., p. 24; Pollock and Maitland, *Hist. Eng. Law*, ii. p. 602). The writ was returned, read in Court, and the plaintiff's counsel expanded the plaint into a connected story, adding time, place, etc. This was called "*conte*," from the French word meaning story or narrative (Pollock and Maitland, *Hist. Eng. Law*, p. 602). The defendant's counsel stated the defence, called "*plea*," from the French *plcé* (Stephen on *Pleading*, 7th ed., App. Note 1). The plaintiff's counsel then replied, and the defendant in turn rejoined. When either party considered the statement of his opponent untrue, he denied it, and was said to take issue on it; and if he considered it insufficient in law, he demurred to it (see DEMURRER), and the parties were then described as being at issue, that is to say, at the end of their pleading (Stephen on *Pleading*, 7th ed., p. 25). A minute of the pleadings was made on a parchment roll, which was called the Record (*ibid.* p. 26); and if the issue was one of fact, the judges directed it to be tried in the mode of trial fixed upon; and if it was one of law, they decided upon it themselves (*ibid.*).

The pleadings were made orally until about the middle of the reign of Edward III., when this practice was superseded by delivering pleadings in writing (*ibid.* 24, 29; 1 Reeves, p. 95), which were in the first instance entered upon the parchment rolls by the pleaders of each party. Subsequently, in the reign of Edward IV., the practice was adopted of writing them on paper and delivering them between the parties before entering them on the record (3 Reeves, p. 427; Stephen on *Pleading*, 7th ed., p. 29).

William the Conqueror ordained that pleadings should be in French (Bacon's *Abr.* "Pleas and Pleadings," 6th ed., vol. v. p. 321; 3 Blackstone, 12th ed., p. 317). Latin was first introduced into pleadings in the reign of Edward III., when it was enacted by statute that all pleas should be pleaded, shown, defended, answered, debated, and judged in the English tongue, but be entered and enrolled in Latin (36 Edw. III. c. 15; 3 Blackstone, 12th ed., p. 318). Latin afterwards continued in use until the time of Cromwell, when English was adopted. On the restoration of Charles II. Latin was again resorted to, and remained in use until the passing of the 4 Geo. II. c. 26, which directed that all proceedings should be in English (3 Blackstone, 12th ed., p. 322; Petersdorff's *Abr.* vol. iv. p. 136).

Prior to the coming into operation of the Judicature Acts, the pleadings in the Courts of common law commenced with the declaration, which was a statement on the part of the plaintiff of the facts on which his cause of action depended. The delivery of this pleading was necessary to the continuation of the action, for if the plaintiff failed to deliver it within the prescribed time, the defendant was entitled to sign judgment of *non pros.* (*non prosequitur*) against him (Stephen on *Pleading*, 7th ed., p. 106).



The declaration, when delivered, had to correspond with the writ with respect to the names and number of the parties to the action, the character or right in which they sued or were sued, and the cause of action (1 Chitty on *Pleading*, 7th ed., p. 265).

The statement of each cause of action in the declaration was termed a "count" (see COUNT IN DECLARATION), and formerly, when variances between the evidence and the record could not be amended, a declaration might, subject to certain restrictions, have contained several counts founded on one and the same principal matter of complaint, but varied in statement, description, or circumstances only (1 Chitty on *Pleading*, 7th ed., p. 424). Various powers of amendment having, however, been granted by statutes (see 9 Geo. IV. c. 15, and 3 & 4 Will. IV. c. 42, s. 23), several counts were no longer permissible, unless a *distinct subject-matter of complaint* was intended to be established in respect of each count (see Pleading Rules, Hilary Term, 4 Will. IV. r. 5); and later on it was provided that several counts on *the same cause of action* should not be allowed, unless on application to the Court or a judge to strike out any count on the ground of such count being in violation of the last-mentioned rules, the Court should consider such counts proper for the determining the real question in controversy (see *Regulæ Generales*, Trinity Term, 1853, rr. 1, 2; Bullen and Leake's *Precedents of Pleadings*, 3rd ed., p. 10). Personal actions at common law were generally divided into actions *ex contractu*, or on contracts, and actions *ex delicto*, or for torts or wrongs. Debt, covenant, and *assumpsit* belonged to the former class, and detinue, trespass, trespass on the case, or case (which included trover), and replevin belonged to the latter class (see Stephen on *Pleading*, 7th ed., p. 10, note (g); and see the respective titles of these actions).

Before the passing of the Common Law Procedure Act, 1852, counts in actions on contracts could not be joined with counts in actions for torts; and, with certain exceptions, counts in one species of action could not be joined with counts in another (1 Chitty on *Pleading*, 7th ed., p. 223). Thus, for instance, *assumpsit* could not be joined with trover, nor could trespass with case, and *assumpsit*, covenant, or debt could not be joined with each other (1 Chitty on *Pleading*, 7th ed., p. 223). These restrictions were removed by the last-mentioned statute, which enacted that causes of action of whatever kind, provided they were by and against the same parties and in the same rights, might be joined in the same suit; but this did not extend to replevin or to ejectment (15 & 16 Vict. c. 76, s. 41).

In declaring in actions on contracts where the count was a special one as distinguished from an *indebitatus* count (see COUNT IN DECLARATION), the body of the declaration in general consisted of the statement of the contract, the averments of the performance of all conditions precedent to the right of action, and the assignment of the breach of the contract, and it concluded with the statement of the special damage, if any existed (Bullen and Leake's *Precedents of Pleadings*, 3rd ed., pp. 58-62). If the special count was framed upon a simple contract, it was essential that it should show that there was a valid consideration to support the defendant's promise (*ibid.* p. 59). In actions for wrongs, the declaration in general stated, first, the matter or thing affected; secondly, the plaintiff's right thereto; thirdly, the injury; and fourthly, the damage sustained by the plaintiff (1 Chitty on *Pleading*, 7th ed., p. 390). Where the right was one implied by law, it was unnecessary to state the origin or creation of such right, but only to state the violation of the right, as, for instance, that the defendant "assaulted and beat the plaintiff." Where, however, the



right alleged to have been violated was one not implied by law, but was a legal conclusion from certain facts, it was necessary to state those facts before alleging the violation of the right (Bullen and Leake's *Precedents of Pleadings*, 3rd ed., p. 7). Both in actions on contract and in actions for tort, the declaration commenced by naming in the margin of the pleading the "venue," that is, the county in which the action was to be tried (see VENUE), and concluded with a claim for damages, or any other remedy claimed. Where it was necessary for the purpose of explaining or introducing the contract or the circumstances constituting the right, the breach or violation of which was complained of, certain prefatory statements were allowed, which were described as inducement (see Bullen and Leake's *Precedents of Pleadings*, 3rd ed., p. 7).

After the plaintiff had delivered his declaration, and had given notice to the defendant to plead, it was incumbent on the defendant to deliver his defence, or *pleas* as they were termed, within the time prescribed by rule, otherwise the plaintiff might sign judgment of *nil dicit* for default of pleading (Stephen on *Pleading*, 7th ed., p. 106). Where the defendant could not put in a defence to the action, and wished to come to terms with the plaintiff as to the allowance of a certain time for payment of the debt or damages claimed, or was desirous for some other reason of not having judgment signed against him for default, he could give the plaintiff a written confession of the action, which was called a *cognovit* (Archbold's *Practice*, 11th ed., p. 930). If the defendant had pleaded before delivering this confession, the *cognovit* usually contained an agreement to withdraw the plea, and it was then termed a *cognovit actionem relictâ verificatione* from the form of entry of it upon the roll (*ibid.* 931).

Pleas were generally divided into two classes, viz.—First, dilatory pleas, and second, peremptory pleas, or pleas in bar (Bullen and Leake's *Precedents of Pleadings*, 3rd ed., p. 435; Stephen on *Pleading*, 7th ed., p. 45; 1 Chitty on *Pleading*, 7th ed., p. 457).

*Dilatory pleas* tended to delay or put off the suit, and did not answer the cause of action, but merely offered a formal objection to the proceedings (Stephen on *Pleading*, 7th ed., p. 51; Bullen and Leake's *Precedents of Pleadings*, 3rd ed., p. 435). They included pleas to the jurisdiction, by which the defendant excepted to the jurisdiction of the Court, and prayed judgment whether the Court could or would take further cognisance of the action (3 Chitty on *Pleading*, 7th ed., p. 8); and pleas in abatement, by which the defendant, without admitting or denying the cause of action, alleged some ground which precluded the plaintiff from recovering upon the writ and declaration as framed, as, for instance, the non-joinder of a necessary party; and then concluded by asking that the writ and declaration should be quashed (*ibid.* 10; Bullen and Leake's *Precedents of Pleadings*, 3rd ed., p. 468). Pleas in abatement were formerly often used without justification for mere purposes of delay, but this practice was to a considerable extent frustrated by 4 Anne, c. 16, s. 11, which required that all pleas in abatement should be verified by affidavit, and by 3 & 4 Will. IV. c. 42, s. 8, which enacted that no plea in abatement of the non-joinder of a person as a co-defendant should be allowed, unless it stated that such person was resident within the jurisdiction of the Court, and unless the place of residence of such person was stated with reasonable certainty in an affidavit verifying such plea.

*Pleas in bar* were pleas that went to the merits of the case. They answered the alleged cause of action, and showed some ground for barring or defeating it (Stephen on *Pleading*, 7th ed., p. 50; Bullen and Leake's



*Precedents of Pleadings*, 3rd ed., p. 435). Pleas in bar included *traverses*, which denied facts stated in the declaration which were material to the cause of action, and pleas in *confession and avoidance*, which, whilst admitting such facts, alleged new facts which avoided their effect (Stephen on *Pleading*, 7th ed., p. 51; Bullen and Leake's *Precedents of Pleadings*, 3rd ed., pp. 435, 437; AVOIDANCE, PLEA IN CONFESSION AND).

*Traverses* consisted, first, of general denials which traversed the principal facts on which the declaration was founded, and were known as *general issues*, such as the pleas of *nunquam indebitatus*, *non assumpsit*, *non est factum*, and *nul tiel record* in actions on contracts, and *Not guilty*, *non detinet*, *non cepit*, in actions of tort (see GENERAL ISSUE); and secondly, of specific denials of some particular allegation in the declaration, and these were called *common traverses* (Stephen on *Pleading*, 7th ed., p. 151).

Pleas in *confession and avoidance* consisted of pleas in justification or excuse and pleas in discharge. The former showed that the plaintiff never had any cause of action, as, for instance, the plea in an action for libel or slander, that the words were true in substance and in fact; and the latter stated facts which showed a subsequent discharge of a once subsisting cause of action, as, for instance, in an action for the recovery of a debt that the defendant had satisfied the plaintiff's claim by payment before action.

If the defence by way of satisfaction or discharge arose before action, it was pleaded in bar generally, but if it arose after action and before plea, it was pleaded to the *further maintenance of the action*, and if after plea, it was pleaded as *puis darrein continuance*, or having arisen since the last plea or entry on the record (1 Chitty on *Pleading*, 7th ed., p. 688; Bullen and Leake's *Precedents of Pleadings*, 3rd ed., p. 437).

Another form of plea in bar was what was known as *estoppel* (see ESTOPPEL). It was pleaded in cases where a party was precluded from alleging a fact in consequence of his own previous act or allegation to the contrary (Stephen on *Pleading*, 7th ed., p. 181). It arose either from matter of record or deed, or from matter of *pais* or fact (*ibid.*). The form of plea stated that the plaintiff ought not to be admitted to say that which the defendant contended that he was estopped from saying, and after giving a reason for the estoppel, and stating that the defendant was ready to verify it, concluded by praying judgment if the plaintiff ought to be admitted against the matter of estoppel to say that which the defendant contends he is estopped from saying (Bullen and Leake's *Precedents of Pleadings*, 3rd ed., p. 450).

Formerly the defendant in an action at law could not plead, by way of set-off against the claim of the plaintiff, debts due to him from the plaintiff, but after the passing of the Statutes of Set-off (2 Geo. II. c. 22, and 8 Geo. II. c. 24), where the claims on both sides were liquidated debts or money demands which could be ascertained with certainty at the time of pleading, the defendant might by his pleading set off the amount claimed by him against a like amount of the plaintiff's claim (Bullen and Leake's *Precedents of Pleadings*, 3rd ed., p. 678). A set-off could not, however, be pleaded where the claim on either side was for unliquidated damages (*ibid.* p. 679).

If the declaration was on the face of it defective in substance or form, the defendant might in general demur, that being the formal mode of disputing the sufficiency in law of the pleading (1 Chitty on *Pleading*, 7th ed., p. 692; Bullen and Leake's *Precedents of Pleadings*, 3rd ed., p. 819). The effect of demurring was to admit for the purposes of the demurrer that the matters of fact alleged in the declaration were to be taken as true, but at the same time to deny that they were sufficient in their legal effect to



support the claim set up by the other side (see DEMURRER). At one time a defendant could not plead and demur to the same pleading, but by sec. 80 of the Common Law Procedure Act, 1852, either party might, by leave of the Court or a judge, plead and demur to the same pleading at the same time (*ibid.*).

If the plaintiff on delivery of the defendant's pleading found that he could not by amendment of the declaration or otherwise support the action, he might either obtain leave to discontinue, or enter a *nolle prosequi* to the whole or any severable part of the cause of action (1 Chitty on *Pleading*, 7th ed., p. 603); or, where the defendant pleaded a plea in abatement, the plaintiff might enter on the roll a *cassetur breve*, i.e. that the writ be quashed, and commence another action against the original defendant with those named in the plea (Stephen on *Pleading*, 7th ed., p. 107), but subsequently to the passing of the Common Law Procedure Act, 1852, this became unnecessary in practice (15 & 16 Vict. c. 76, ss. 34-38). If the plaintiff failed to reply or to take any of the steps above indicated, the defendant was at liberty to sign judgment of *non pros.* against him (Stephen on *Pleading*, 7th ed., p. 106); but if he elected to plead in reply to the defendant's pleas, such pleading was called a Replication (*ibid.* 57).

Where the plaintiff by his replication objected to any plea of the defendant on the ground that it showed no defence in law to the plaintiff's claim, he *demurred* to it (see DEMURRER), or where he relied on any matter of estoppel (see *supra*), he replied by way of estoppel. If he disputed the facts alleged in the plea, he traversed it by a joinder of issue which operated as a denial of the substance of the plea; or if he admitted the facts, but sought to avoid their effect by the averment of some new matter, he replied by way of confession and avoidance (see *supra*).

Another form of replication occurred in cases where the defendant's plea mistook the cause of action, or restricted it to narrower limits than the plaintiff intended. In such cases it became necessary for the plaintiff to restate his cause of action. This form of replication was called a New Assignment (see Bullen and Leake's *Precedents of Pleadings*, 3rd ed., p. 653). It stated that the plaintiff proceeded for another cause of action than that admitted by the defendant's pleading, and such other cause of action had necessarily to be one within the terms of the declaration, as otherwise it would have been demurrable on the ground of departure (*ibid.* 654, 819). When a new assignment was delivered, the defendant pleaded to it as to a declaration (*ibid.* 655), so that new assignments were often pleaded for the purpose of delaying the proceedings and gaining further time. For instances of new assignments, see Bullen and Leake's *Precedents of Pleadings*, 3rd ed., pp. 656, 755; and see also Stephen on *Pleading*, 7th ed., p. 199.

In most cases the pleadings were closed by the replication raising an issue of fact or of law on the defendant's pleas without adding any other reply, but, until they were so closed, they proceeded, each party pleading in turn in like manner, the defendant's answer to the replication being called a Rejoinder, and the subsequent pleadings being respectively termed Surrejoinder, Rebutter, and Surrebutter (Stephen on *Pleading*, 7th ed., p. 58; Bullen and Leake's *Precedents of Pleadings*, 3rd ed., p. 453).

The titles of the pleadings in an action of Replevin, which was an action for unlawfully taking goods out of the possession of their owner, and was chiefly used in cases of unlawful distress, differed from those in other actions (see REPLEVIN). Thus, if the defendant in an action of replevin confessed the taking of the goods, but justified it as a distress for rent, that defence, which would have been called a plea in bar in other actions, was



termed in replevin an *avowry* where the defendant set up title in himself, and a *cognizance* where he alleged the title to be in another by whose orders he distrained, and the plaintiff's reply was called a plea in bar, and the defendant's rejoinder a replication, and so on, the title of each succeeding pleading being altered accordingly (Stephen on *Pleading*, 7th ed., p. 180).

The pleadings in an action of ejectment, which was a kind of mixed action, being partly a personal and partly a real action (see *ibid.* pp. 18, 42), were abolished by the Common Law Procedure Act, 1852, and other proceedings directed to be taken in lieu thereof (15 & 16 Vict. c. 76, s. 178). As to the nature of these pleadings, which were of a very quaint character, see Cole on *Ejectment*; the First Report of the Common Law Commissioners, 1851, p. 54; and FICTIONS, LEGAL; RECOVERY OF LAND.

It only remains to be mentioned that in pleading under the old system in the Courts of common law it was necessary to state, concisely and with certainty, what constituted the cause of action or ground of defence, and to state facts only. Mere matters of evidence could not be stated (Stephen on *Pleading*, 7th ed., p. 283). Nor could arguments on matters of law, or mere inferences of law (1 Chitty on *Pleading*, 7th ed., p. 236; Bullen and Leake's *Precedents of Pleadings*, 3rd ed., p. 9). The facts had to be stated logically in their natural order, and in a clear and distinct manner (1 Chitty on *Pleading*, 7th ed., pp. 255, 256). Duplicity was not permissible (*ibid.* 249; Stephen on *Pleading*, 7th ed., p. 313), and a pleading that was inconsistent with itself, or *repugnant* as it was termed, was open to objection (1 Chitty on *Pleading*, 7th ed., p. 255; Stephen on *Pleading*, 7th ed., p. 335).

A *departure*, which was an abandonment by the party pleading of the ground of action or defence adopted by him in his previous pleading, and the taking up of another ground in a subsequent pleading, was not allowed (Stephen on *Pleading*, 7th ed., p. 358).

Each count in a declaration had to contain an entire cause of action in itself, and each separate plea had to be a complete answer to the whole or some separate cause of action.

See further Bullen and Leake's *Precedents of Pleadings*, 3rd ed.

(b) *Chancery*.—A suit on the equity side of the Court of Chancery on behalf of a subject was ordinarily commenced by a petition, which in old times was called an English *Bill*, to distinguish it from proceedings in suits within the ordinary or common law jurisdiction of the Court (as to which, see 12 & 13 Vict. c. 109). The bill was addressed to the Lord Chancellor, Lord Keeper, or Lords Commissioners for the custody of the Great Seal. If the suit was instituted on behalf of the Crown, or of persons claiming its particular protection, as, for instance, the objects of a public charity, the procedure was by *information* by the proper officer.

Bills by which proceedings were instituted were termed original bills; bills for supplying defects in original bills were termed bills in the nature of original bills. Original bills were divided into those praying relief and those not praying relief. The first class was again subdivided into (1) bills claiming relief against the opposite party, (2) bills of interpleader, and (3) *certiorari* bills. The second class consisted of (1) bills to perpetuate testimony, and (2) bills of discovery.

An original bill was in the nature of a declaration at common law, and was framed in the style of a petition. It contained a statement of the rights of the plaintiff, by whom and how he had been injured, or what assistance of the Court he desired, and a concise narrative of the material facts, matters, and circumstances on which he relied; and it prayed



specifically for the relief which he conceived himself entitled to, and also for general relief (for the matter of the bill, see Daniell, *Chancery Practice*, 5th ed., pp. 266 *seq.*). Until the Chancery Amendment Act, 1852, an original bill was said to consist of nine parts (see Mitford, *Pleadings*, 5th ed., pp. 49 *seq.*), but afterwards of four parts only, viz.—(1) The address to the person or persons holding the Great Seal; (2) the name and address of the person complainant; (3) the statement of the plaintiff's case, commonly called the *stating part*; and (4) the prayer for relief.

In certain cases (*e.g.* in suits to obtain the benefit of a lost instrument, or for discovery of documents and relief thereon) it was necessary that the bill should be accompanied by an affidavit, in default of which it was liable to demurrer.

The bill was signed by counsel, and printed,—except in certain urgent cases where a written bill was allowed on an undertaking to file a printed bill within fourteen days,—and was filed at the Record and Writ Clerks' Office, and was then of record and of effect in Court (Cons. Order 8, r. 3). An information was signed by the Attorney-General.

Formerly, when the bill was filed, the plaintiff sued out and served the defendant with a writ of *subpœna*, but under the above-mentioned Act he served the defendant with a printed copy of the bill, indorsed with a direction to enter an *appearance* within eight days. Before the Act the bill contained an interrogating part, but afterwards *interrogatories* no longer formed part of the bill, but might be filed separately, within eight days from the time limited for appearance. The interrogating part was usually an exact echo of the stating part of the bill, but the separate interrogatories, if pertinent to the case, need not have been founded on an allegation in the bill.

After appearance, the defendant, if not interrogated, was not bound to answer, but might put in what was called a *voluntary answer*. If he considered that the plaintiff was not entitled to the relief claimed, he could state his objection, if appearing upon the face of the bill, by *demurrer*, or otherwise by *plea*; or, if relinquishing all claim to the property in question in the suit, he could put in an answer called a *disclaimer* (for provisions for entry of appearance for the defendant in case of his default, see 15 & 16 Vict. c. 86, s. 4; Cons. Order 10, rr. 3, 4, 6).

A demurrer in equity was much the same as in law (see DEMURRER). If it was allowed, the bill was dismissed; if overruled, the defendant was ordered to answer. A plea might be either to the jurisdiction; or to the person, showing some disability in the plaintiff; or in bar. A defendant might plead as to part of a bill, demur as to part, answer as to part, and disclaim as to the residue, so as these defences clearly referred to distinct parts of the bill. By demurrer the plaintiff demanded the judgment of the Court, whether he should be compelled to answer the bill or not; and by plea he showed cause why the suit should be dismissed, delayed, or barred (Mitford, *Pleadings*, 5th ed., p. 127; as to pleas, see Beames, *Pleas in Equity*).

The usual defence to a bill was by *answer*, which was the defendant's statement as to the facts stated in the bill or comprised in the interrogatories; and by means of it the plaintiff obtained *discovery*. Before the parties to an action in a Court of common law could be compelled to give evidence, discovery was peculiar to a Court of equity; but the common law procedure was altered by legislation in 1851 and subsequent years. The answer was given upon oath, and was printed, and signed by counsel. It must have been direct and without evasion, and must have either denied or confessed all the material parts of the bill.

In certain cases the defendant was entitled, after answer, to file



interrogatories for the examination of the plaintiff, prefixing a *concise statement* of the subject on which discovery was sought; but where he had any relief to pray against the plaintiff, he could do so by filing a *cross bill* (see 15 & 16 Vict. c. 86, s. 19).

The plaintiff might file *exceptions* to the answer, if he considered it insufficient, the allowance of which obliged the defendant to put in a more sufficient answer. If the plaintiff were content to take the answer as true, he could proceed to a hearing upon bill and answer only; otherwise, he put in a *replication* joining issue. So if the plaintiff had not required an answer, and the defendant had not answered, pleaded, or demurred (in which case he was considered to have traversed the bill), the plaintiff could file a replication to the same effect (see Cons. Order 17). *Special replication* and consequent *rejoinder*, *surrejoinder*, and *rebutter*, were abolished owing to the inconvenience, delay, and length of pleadings which they caused; and in 1845 the *subpœna to rejoin*, formerly required for joinder of issue, was also abolished.

If a defendant, required to answer, neither answered, pleaded, nor demurred, he was in contempt, and the plaintiff was entitled either to proceed as if the defendant had traversed the bill, in which case he filed a *traversing note* (see Cons. Order 13), or, upon execution of an attachment against the defendant, to obtain an order that the bill be taken *pro confesso* (Cons. Order 22).

As to the amendment of the pleadings, it was provided by the Act above mentioned (see s. 53), that it should not be necessary to file a *supplemental bill* for the purpose only of stating or putting in issue facts or circumstances occurring after the institution of the suit; but this might be done by way of amendment, before decree. After decree, a supplemental bill was necessary. Where a suit was not in such a state as to allow of amendment, the plaintiff might file a *supplemental statement*, but as, before decree, the bill might in almost all cases be amended, this course was rarely followed (see Daniell, vol. ii. p. 1395). Corrections could be made in an answer before it was filed, but after filing the defendant must have applied for leave to file a *supplemental answer*.

It may be added that under 15 & 16 Vict. c. 86 an order for administration could be obtained on *administration summons* without formal pleading, and under 13 & 14 Vict. c. 35 a judicial decision on a point of law where the facts were admitted could be obtained by way of *special case*, without pleadings.

[*Authorities*.—Daniell, *Chancery Practice*, 5th ed.; Mitford (Lord Redesdale), *Pleadings*, 5th ed.; Stephens, *Commentaries*, 6th ed.]

#### I. CHANGES INTRODUCED BY THE JUDICATURE ACT.

The principles on which pleadings were framed in the days of the Plantagenets, and the rules which regulated them then, continued substantially the same into this century (see PLEADING, *Before the Judicature Acts*). Their practical utility was, however, seriously impaired by the over-subtlety of the pleaders and by the excessive rigour with which the rules were applied; the merits of the case being entirely subordinated to technical questions of form. A determined effort was made to correct these defects by passing the Common Law Procedure Acts, 1852–1860. In 1873, however, it was found necessary to adopt a more thorough reform; and the Judicature Act introduced into the new High Court of Justice the system of pleading which, with some slight modifications, is still in force.



The most material changes made by this Act in the law relating to pleadings were the following:—

(i.) Forms of action were abolished. A plaintiff need no longer specify the particular form of action in which he seeks to recover judgment. He is now allowed to state the facts on which he relies, and the Court will grant him the remedy to which on those facts he is entitled. See ACTIONS, vol. i. p. 105.

(ii.) Each party must now state facts and not conclusions of law. He was bound, before 1875, to set out with reasonable precision the points which he intended to raise; but this he generally did by stating, not the facts which he meant to prove, but the conclusion of law which he sought to draw from them. His opponent thus learnt that he desired to prove some set of facts which would sustain a given legal conclusion; but how he proposed to sustain that legal conclusion was not disclosed. For instance, there was a very common form of declaration: "For money received by the defendant to the use of the plaintiff." A claim in that form might be established by some six or seven entirely different sets of facts, and it could not be ascertained from the plaintiff's pleading which set of facts would be set up at the trial, to show that the particular money claimed was received to the use of the plaintiff. Now the plaintiff must plead the facts on which he proposes to rely as showing that the sum of money which he claims was received by the defendant to his use.

(iii.) So, too, with the Defence. "The general issue" is abolished. In an action for goods sold and delivered, the defendant was formerly allowed to plead that he "never was indebted as alleged." This is a conclusion of law, and at the trial it was open to him to give in evidence under this plea any one or more of several totally different defences, *e.g.* that he never ordered the goods; that they never were delivered to him; that they were not of the quality ordered; that they were sold on a credit which had not expired at the time that the action was commenced; or the Statute of Frauds had not been complied with. Now a mere denial of the debt is inadmissible (Order 21, r. 1). So in an action for money received to the use of the plaintiff, the defendant must either deny the receipt of the money, or the existence of those facts which are alleged to make such receipt a receipt to the use of the plaintiff.

So in actions of tort, the defendant was formerly allowed to plead "the general issue" Not Guilty. Under that plea it was open to him at the trial to raise several distinct defences. Thus the defendant in an action of libel or slander by one short and convenient plea of "Not Guilty," simultaneously denied the publication of the words complained of, denied that he published them in the defamatory sense imputed by the innuendo, or in any defamatory or actionable sense which the words themselves imported, asserted that the occasion was privileged, and also denied that the words were spoken of the plaintiff in the way of his profession or trade, whenever they were alleged to have been so spoken. But now this compendious mode of pleading is abolished. "Not Guilty" can no longer be pleaded. The defendant must deal specifically with every allegation of which he does not admit the truth (Order 19, r. 17).

(iv.) Demurrers were abolished. It is true that either party is still allowed to place on the record an *objection in point of law*, which is very similar to the former demurrer. But there is this important difference. The party demurring could formerly insist on having his demurrer separately argued, which caused delay. But now such points of law are



argued at the trial of the action; it is only by consent of the parties, or by order of the Court or a judge, that the party objecting can have the point set down for argument and disposed of before the trial (Order 25, r. 2). And, as a rule, such an order will only be made where the decision of the point of law will practically render any trial of the action unnecessary.

(v.) Pleas in abatement were abolished. If either party desires to add or strike out a party, he must apply by summons (see *Kendall v. Hamilton*, 1879, 4 App. Cas. 504; *Pilley v. Robinson*, 1887, 20 Q. B. D. 155; *Wilson v. Balcarres Brook Steamship Co.*, [1893] 1 Q. B. 422; and PARTIES, *ante*, vol. ix.). No cause or matter now "shall be defeated by reason of the misjoinder or non-joinder of parties" (Order 16, r. 11).

(vi.) Equitable relief is now granted, and equitable claims and defences are now recognised, in all actions in the High Court of Justice.

(vii.) Payment into Court was for the first time allowed generally in all actions.

(viii.) The right of set-off was preserved unchanged; but a very large power was given to a defendant to counterclaim. He can raise any kind of cross-claim against the plaintiff, and even against the plaintiff with others, subject only to the power of a Master or judge to order the claim and cross-claim to be tried separately, if they cannot conveniently be tried together.

(ix.) The defendant is also allowed in certain cases to bring in third parties and claim contribution or indemnity against them in the original action in which he himself is sought to be made liable. See PARTIES.

## II. OUR PRESENT PLEADINGS.

The plaintiff naturally begins with a Statement of Claim, which takes the place of the former *declaration*. Instead of *pleas*, the defendant now delivers a Defence, or, it may be, a Defence and Counterclaim. The *replication* is now called a Reply. The further pleadings, which now are rarely seen, retain their ancient names: *rejoinder*, *surrejoinder*, *rebutter*, and *surrebutter*. Each of these alternate pleadings must either admit or deny each of the facts alleged in the last preceding pleading of his opponent; it may also of course allege additional facts, where necessary, which in turn must be either admitted or denied by the next pleading. In this way the matters mutually admitted are extracted and distinguished from those really in controversy; and the litigation is narrowed down to one or two definite *issues*. Entries are no longer made on any parchment roll. The pleadings are written or printed on paper and interchanged between the parties; the solicitor of each party in turn delivers his pleading to the solicitor of the other party, or to the party himself, if he does not employ a solicitor. This goes on till the pleadings are "*closed*." The cause is then entered for trial, for which purpose two copies of the complete pleadings are lodged with the officer of the Court (Order 36, r. 30); and the copy which is marked with the stamp denoting the fee paid on entry is regarded as the *record*.

Every pleading should be marked on its face with the date of the day on which it is delivered, with the letter and number of the writ, the title of the action, and the description of the pleading; a Statement of Claim should also state the date of the writ. It must be indorsed with the name and place of business of the solicitor and agent (if any) who delivers it, or the name and address of the party delivering it, if he does not act by a solicitor (Order 19, r. 11). If it contains less than ten folios (*i.e.* 720 words or figures) it may be either printed or written, or partly printed and partly written; if it contains ten folios or more, it must be printed. A folio



contains seventy-two words or figures, every figure being counted as one word. Every pleading must be divided into paragraphs numbered consecutively. Dates, sums, and numbers should be expressed in figures, and not in words. It is not necessary, though it is generally desirable, that a pleading should be drawn or settled by counsel; where it has been, he must sign his name at the end of it; if not settled by counsel, it must be signed by the solicitor or by the party if he sues or defends in person.

Under the Judicature Act all technical objections are discouraged. Non-compliance with the rules of practice does not of itself render any proceeding void; and no application to set aside any proceeding for irregularity will be allowed, unless it is made within reasonable time, nor after the party applying has taken any fresh step after knowledge of the irregularity (Order 70, rr. 1, 2). In particular, no technical objection can now be raised to any pleading on the ground of any alleged want of form (Order 19, r. 26). Still, "the Court or a judge may at any stage of the proceedings order to be struck out or amended any matter in any indorsement or pleading which may be unnecessary or scandalous, or which may tend to prejudice, embarrass, or delay the fair trial of the action" (Order 19, r. 27).

### III. FUNDAMENTAL RULE OF MODERN PLEADING.

The fundamental rule of our present system of pleading is this: "Every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved" (Order 19, r. 4). This rule involves and requires four separate things:—

- (i.) Every pleading must state material facts and material facts only.
- (ii.) It must state facts, and not law.
- (iii.) It must state facts, and not the evidence by which they are to be proved.
- (iv.) It must state such facts in a summary form.

(i.) *Every Pleading must state material Facts only.*—Every fact is material which is essential to the plaintiff's cause of action or to the defendant's defence—which they must prove or fail. Every statement which need not be proved is immaterial and should be omitted. The question whether a particular fact is or is not material, depends mainly on the special circumstances of the particular case. Sometimes it is material to allege and prove that the defendant had notice of a certain fact; at other times it is sufficient to aver that he did some act, without inquiring into the state of his mind at the time. In some cases the defendant's intention is material; in a few cases his motive. Sometimes it is necessary to give details as to time, place, or pedigree. As a rule, the precise wording of a document is not material: it is sufficient to state briefly its effect (Order 19, r. 21; *Darbyshire v. Leigh*, [1896] 1 Q. B. 554; but see *Harris v. Warre*, 1879, 4 C. P. D. 125). Matters which merely affect the *amount* of damages recoverable need not, as a rule, be pleaded; though it is often convenient to see them on the record. But each party must always state his whole case. He must plead all the material facts on which he means to rely at the trial; otherwise he is not entitled to give any evidence of them at the trial. The Statement of Claim must disclose a good cause of action; the Defence must show a good answer to the Statement of Claim. No averment must be omitted which is essential to success.

But the pleader need only allege facts which are material at the present



stage of the action. It is sufficient that each pleading in turn should contain in itself a good *prima facie* case, without reference to possible objections not yet urged. "It is no part of the Statement of Claim to anticipate the Defence, and to state what the plaintiff would have to say in answer to it" (per James, L.J., in *Hall v. Eve*, 1876, 4 Ch. D. at p. 345). Thus to anticipate the answer of the adversary is, according to Hale, C.J., "like leaping before one come to the stile" (*Sir Ralph Bovey's case*, 1673, Vent. 217).

(ii.) *Every Pleading must state Facts, and not Law.*—Conclusions of law, or of mixed law and fact, may no longer be pleaded. It is for the Court hereafter to declare the law arising upon the facts proved before it. A plaintiff must not aver, "I am entitled to certain property," or "It was the defendant's duty to do so and so." He must state the facts which in his opinion give him that title, or impose on the defendant that liability or that duty. So, too, a defendant must not say merely, "I do not owe the money"; he must allege facts which will show that he does not owe it (Order 21, rr. 1, 2, 3). He must deal clearly and explicitly with each of the facts alleged by the plaintiff. If the defendant pleads that he never agreed as alleged, this will be taken to mean that he never in fact made any such agreement—not that it is bad in law, or not binding on him because he is an infant, or because he was induced to enter into it by fraud. All facts tending to show the insufficiency or illegality of any contract must be specially pleaded (Order 19, r. 20). And whenever the same legal result can be attained in several different ways, it is not sufficient to aver merely that the result has been arrived at; the facts must be stated showing how and by what means it was attained.

(iii.) *Every Pleading must state Facts, and not Evidence.*—Facts should be alleged as facts, without the evidence by which they are to be proved. It is not necessary to state in the pleadings circumstances which merely tend to establish the facts at issue. The fact in issue between the parties is the *factum probandum*, the fact to be proved, and therefore the fact to be alleged. It is unnecessary to tell the other side how it is proposed to prove that fact; such matters are merely evidence, *facta probantia*, facts by means of which one proves the fact in issue. Such facts will be *relevant* at the trial, but they are not *material facts* for pleading purposes.

Thus it is wrong to set out in a pleading admissions by the opponent (*Davy v. Garrett*, 1878, 7 Ch. D. 473; *Lumb v. Beaumont*, 1884, 49 L. T. 772). Wherever it is material to allege malice, fraudulent intention, knowledge, or other condition of the mind of any person, it is sufficient to allege the same as a fact without setting out the circumstances from which it is to be inferred (Order 19, r. 22). Wherever it is material to allege notice of any fact, it is sufficient to allege such notice as a fact, unless the form or the precise terms of such notice, or the circumstances from which such notice is to be inferred, be material (Order 19, r. 23). Whenever any contract or any relation between any persons is to be implied from a series of letters or conversations, or otherwise from a number of circumstances, it is sufficient to allege such contract or relation as a fact, and to refer generally to such letters, conversations, or circumstances without setting them out in detail (Order 19, r. 24). In every case in which the cause of action is a stated or settled account, the account should be alleged with particulars; but in every case in which a statement of accounts is relied on only by way of evidence or admission of another cause of action which is pleaded, the account should not be alleged in the pleadings (Order 20, r. 8).

(iv.) *Every Pleading must state material Facts in a Summary Form.*—Material facts must be stated clearly and definitely, and yet briefly. The



pleading should be as concise as is consistent with precision and clearness. Material dates and names should be stated; else the opponent will apply for particulars (see PARTICULARS, *ante*, vol. ix.). The same person or thing should be called by the same name throughout the pleading; pronouns should be avoided wherever they would be ambiguous. Facts should be alleged as facts, in clear and positive terms, in short terse sentences, and in strict chronological order. Pleadings are to be "as brief as the nature of the case will admit" (Order 19, r. 2). Prolixity involves costs (*ibid.* r. 5).

This necessary brevity can be attained in two ways:—

(a) By omitting everything that is immaterial or unnecessary. It is bad pleading to insert a single unnecessary allegation. Thus neither party should cite public Acts of Parliament, or state in his pleading the propositions of law which he proposes to urge upon the Court. Neither party may plead the evidence by which he proposes to prove the facts on which he relies (Order 19, r. 4). Neither party need, in any pleading, allege any matter of fact which the law presumes in his favour, or as to which the burden of proof lies upon the other side (Order 19, r. 25). Or the performance of any condition precedent; as such an averment is now implied in every pleading (Order 19, r. 14). Neither party need set out the whole or any part of any document, unless its precise words are material. It is sufficient to state its effect as briefly as possible (Order 19, r. 21). It is not necessary for any defendant to plead any denial or defence as to damages claimed or their amount; they shall be deemed to be put in issue in all cases, unless expressly admitted (Order 21, r. 4). It is unnecessary for either party to plead to his opponent's prayer or claim, or to his particulars, or to any matter introduced by a *videlicet*. He need only deal with the allegations contained in the body of the preceding pleading. It is unnecessary for either party in his pleading to refer to any item for which his opponent has given him credit, or to any interlocutory proceeding in the action, or to recount the history of the case since writ, or to plead any matter, or to plead to any matter, which merely affects costs. Neither party should plead to any matter of law set out in his opponent's pleading. This may be treated as mere surplusage (*Richardson v. Mayor of Orford*, 1793, 2 Black. H. 182). Neither party may plead to any matter of fact which is not alleged against him (*Rassam v. Budge*, [1893] 1 Q. B. 571). Lastly, as we have seen, it is not necessary for either party to plead any fact which is not yet material to his case; though he may reasonably suppose that it may become material at a later stage.

(b) And even when only material facts are pleaded, it is still necessary to secure brevity by omitting all unnecessary details in the statement of those material facts. A certain amount of detail is essential to ensure clearness and precision. "Although pleadings must now be concise, they must also be precise" (per Kay, J., in *Townsend v. Parton*, 1882, 30 W. R. 287; 45 L. T. 756). Indeed, Order 19, r. 6, expressly requires that, whenever particulars are necessary, they must be stated, with dates and items, in the body of the pleading, unless they are particulars of debt, expenses, or damages, and exceed three folios (216 words or figures), when they must be drawn up separately. But this rule does not state when such particulars are necessary, or what degree of particularity is expected of the pleader. Under the old system of pleading there was much learning on the subject of "Certainty," as it was called. But this is necessarily qualified to some extent by the important alterations made by the Judicature Act. No general rule can be laid down which will be more precise than this, stated



by Lord Justice Bowen in *Ratcliffe v. Evans*, [1892] 2 Q. B. at pp. 532, 533: "As much certainty and particularity must be insisted on, both in pleading and proof, as is reasonable, having regard to the circumstances and to the nature of the acts themselves. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry."

#### IV. STATEMENT OF CLAIM.

*Parties.*—Before drafting a Statement of Claim, counsel must carefully consider whether all necessary parties have been brought before the Court, and also whether any have been improperly joined. He has to show in his pleading a right of action in every plaintiff, and a liability on the part of each defendant. A mere misnomer on the writ can be amended without leave in the Statement of Claim. If the plaintiff desires to add a fresh plaintiff or defendant, an application must be made under Order 16, rr. 11 and 12; but he can always drop a plaintiff or a defendant, if he wishes, by merely omitting the name from the head of his pleading. He is not bound to continue the action against all the defendants named on the writ. As to what parties are necessary, and what are optional, see PARTIES, *ante*, vol. ix.

*Joinder of Causes of Action.*—The plaintiff may, speaking generally, unite in one action any number of causes of action against the same defendant or defendants (see JOINDER OF CAUSES OF ACTION), so long as they all existed at the date of the writ. It does not matter that some of them may not be mentioned on the writ. For it is not necessary to set forth in a general indorsement "the precise ground of complaint, or the precise remedy or relief to which the plaintiff considers himself entitled" (Order 3, r. 2). And "whenever a Statement of Claim is delivered, the plaintiff may therein alter, modify, or extend his claim without any amendment of the indorsement of the writ" (Order 20, r. 4). The plaintiff can claim for any damage that has accrued to him since writ from a cause of action vested in him before writ, except where such damage is an essential part of the cause of action (Order 36, r. 58). But he cannot claim damages in respect of any cause of action which has only accrued to him since writ. For such damages he must issue a second writ; and he can then apply, if he thinks fit, to have the two actions consolidated (*Martin v. Martin*, [1897] 1 Q. B. 429). A plaintiff should always avail himself of all his causes of action; but each should be stated, so far as may be, separately and distinctly (Order 20, r. 7).

*Drafting a Statement of Claim.*—A Statement of Claim should state the material facts on which the plaintiff relies, and then claim the relief he desires. It may be necessary to begin with certain introductory averments—*matters of inducement*, as they were called—stating who the parties are, what trade they carry on, how they are connected, and any other circumstances leading up to the dispute, and explaining what is to follow. Then the contract should be alleged, and after the contract its breach; or if it be an action of tort, the right which has been violated should be alleged (unless it be one which every citizen possesses), and then its violation. Next should follow in either case the allegations as to damage; and then the claim for relief—be it damages, or an injunction, a declaration, a *mandamus*, or a receiver. Lastly, a place for trial must be named, unless the plaintiff desires to have the action tried in Middlesex (see VENUE).

It should clearly appear on the pleading whether the contract on which the plaintiff relies is express or implied; if express, its date should be stated,



and whether it was written or verbal; if implied, the facts should be set out from which the plaintiff contends a contract should be implied. If the contract be by deed, this fact should be stated; in other cases a consideration must be shown. If the contract be in writing, the exact words need not be set out; it is sufficient to state shortly what the plaintiff conceives to be its legal effect (Order 19, r. 21; *Darbyshire v. Leigh*, [1896] 1 Q. B. 554). It is no longer necessary to aver that all conditions precedent have been performed (Order 19, r. 14). Every breach of contract that occurred before the date of writ should be set out, and in language wide enough to cover the whole of each breach. So in actions of tort, it is not sufficient to allege that a right, or a duty, or a liability existed; the facts must be stated which gave rise to such right or created such duty or liability. All special damage must be specially claimed. Matter in aggravation of damages may be set out in the Statement of Claim, if the plaintiff desires (*Millington v. Loring*, 1880, 6 Q. B. D. 190).

*Time.*—Where the writ is specially indorsed under Order 3, r. 6 (see SPECIAL INDORSEMENT), no further Statement of Claim may be delivered; the indorsement on the writ is deemed to be the Statement of Claim (Order 20, r. 1 (a)). This is so, although the defendant on entering an appearance demands a Statement of Claim (*G. v. H.*, 1883, W. N. 233). If the plaintiff desires in any way to add to or vary the statement indorsed on his writ, he must deliver an amended Statement of Claim, which he can do once without leave (Order 28, r. 2).

Where, however, the writ is generally indorsed, the plaintiff must, before delivering any pleading, take out a summons for directions under Order 30, r. 1. If on the hearing of this summons pleadings are ordered, the plaintiff must deliver a Statement of Claim within the time prescribed; if the defendant on entering appearance required a Statement of Claim, it must be delivered within five weeks from the time when the plaintiff has notice of this requirement; if the defendant did not require one, then within six weeks after appearance has been entered.

## V. DEFENCE.

So far we have dealt only with the statement by a party of his own case. But after the first pleading, each party must do more than state his own case; he must deal with that presented by his opponent.

1. *Attacking the Statement of Claim.*—The first question is, “Has the plaintiff properly presented his case?” or sometimes, “Has the plaintiff presented any case?” The defendant’s counsel, before drafting the Defence, should carefully consider the Statement of Claim, and the way in which the action is shaped against his client. If the plaintiff has shown no cause of action at all, the defendant may apply under Order 25, r. 4, to dismiss the action as being frivolous and vexatious, though such an order is only made in a clear case. (But see the Vexatious Actions Act, 1896, 59 & 60 Vict. c. 51.) Such an application should be made, if at all, before any Defence is delivered. Then, is the claim properly pleaded? If not, it may be necessary to take out a summons to have the Statement of Claim amended under Order 19, r. 27, as being embarrassing. Or to apply for particulars (see PARTICULARS). Are all necessary parties before the Court, or have any been improperly joined? (see PARTIES). Have claims been joined which cannot conveniently be disposed of together? If so, the defendant should apply to have them severed under Order 18, rr. 1, 7, 8, or 9 (see JOINDER OF CAUSES OF ACTION). Should the action be remitted to the County Court, under either sec. 65 or sec. 66 of the County Courts Act, 1888 (51 & 52 Vict. c. 43)?



Or is it from its nature one that ought to be referred, and has the plaintiff ever agreed in writing to submit the dispute to arbitration? If so, the defendant must at once, before delivering any pleading or taking any other step in the action, except appearing, apply to a Master to stay the proceedings, under sec. 4 of the Arbitration Act, 1889 (52 & 53 Vict. c. 49).

2. *Answering the Statement of Claim.*—There are three ways in which the defendant can deal with his opponent's pleading.

(a) He may take an *objection in point of law* that even if every word in the Statement of Claim were true it would disclose no cause of action.

(b) He may *traverse* some or all of the material allegations contained in it.

(c) He may admit them as being true so far as they go; but add several other facts which put a different complexion on the case. This is the old *confession and avoidance*.

He may adopt any one or more of these methods of pleading, so long as he makes it quite clear which he is adopting. He may take all three courses at once; the same allegation may be traversed in point of fact, and objected to as bad in law, and at the same time collateral matter may be pleaded to destroy its effect. Any number of defences may be pleaded together in the same action without leave, although they are obviously inconsistent. A defendant may "raise by his Defence, without leave, as many distinct and separate, and therefore inconsistent, defences as he may think proper, subject only to the provision contained in Order 19, r. 27," as to striking out embarrassing matter (per Thesiger, L.J., in *Berdan v. Greenwood*, 1878, 3 Ex. D. 255). And a Defence is not embarrassing merely because it contains inconsistent averments (*In re Morgan, Owen v. Morgan*, 1887, 35 Ch. D. 492).

(i.) *Objection in point of law* can only be raised when the defect is apparent on the face of the Statement of Claim. The defendant cannot state new facts in his Defence or in an affidavit, and then contend that the result of the combination is to show that the plaintiff has no case. It is the province of a plea in confession and avoidance to state new facts which put the plaintiff out of Court.

No one is bound to place on the record an objection in point of law, except in one case. If he wishes to apply under the latter part of rule 2 of Order 25 to have the point of law set down for hearing and disposed of before the trial, then he must raise it on his pleading. But at the trial the defendant will always be allowed to raise any point of law whether he has stated it in his Defence or not. An objection in point of law must always be taken clearly and explicitly. An allegation which wears a doubtful aspect, and may be either a traverse or an objection, is embarrassing, and will be struck out (*Stokes v. Grant*, 1878, 4 C. P. D. 25). If the plaintiff has (improperly) pleaded matter of law, the defendant should take no notice of this part of the claim. It is surplusage, and he need not reply to it.

(ii.) *Traverses.*—The office of a traverse is to contradict, not to excuse; the object of it is to compel the plaintiff to prove the truth of the allegation traversed. It does not dispute the sufficiency in law of the plaintiff's allegation: that must be done, if at all, by an objection. Nor may matter justifying an act be insinuated into a plea which denies the act. To plead "There never was any such agreement as alleged" is a totally different thing from saying, "There was an agreement; but I dispute its validity in point of law; wherefore I broke it." If the defendant wishes to contend that any contract on which the plaintiff relies is invalid, he must do something more than traverse the agreement: he must plead



specially by way of confession and avoidance the matters of fact which render it invalid (Order 19, r. 20). A traverse merely denies the fact; it leaves unquestioned its sufficiency in law. Conversely, only allegations of fact should be denied; no traverse need be taken on any matter of law. Nor should the pleader ever traverse matter not alleged against him: he should be content to answer what is laid against him in the Statement of Claim, and not trouble about any other matters which the plaintiff might have, but has not, raised (*Rassam v. Budge*, [1893] 2 Q. B. 524).

There are three leading rules which any party must bear in mind when traversing:—

(a) Every allegation of fact in any pleading, which is not denied specifically, or by necessary implication, or stated to be not admitted, shall be taken to be admitted, except as against an infant, lunatic, or person of unsound mind, not so found by inquisition (Order 19, r. 13; and see *Harris v. Gamble*, 1877, 6 Ch. D. 748).

As a rule, each party should admit whatever he knows to be true; and traverse only those allegations which he really means to dispute at the trial. It looks weak to deny everything; moreover, it increases the cost of the litigation.

(b) When a party denies any allegation of fact made by his opponent he must not do so evasively, but answer the point of substance (Order 19, r. 19). A traverse must be neither too large nor too narrow, nor too literal: it may become evasive if it follows too closely the precise language of the allegation traversed. Thus if an allegation be made with divers circumstances, it is not sufficient to deny it along with those circumstances (Order 19, r. 19). That is to say, if the plaintiff alleges that he paid the defendant £500 at 35 Fleet Street on 3rd March 1898, it is an evasive traverse for the defendant to plead: "The plaintiff did not pay the defendant £500 at 35 Fleet Street on 3rd March 1898." The full traverse would be: "The plaintiff never paid the defendant £500 or any other sum at 35 Fleet Street, or at all."

(c) It is not sufficient for a defendant in his Defence to deny generally the grounds alleged by the Statement of Claim, or for a plaintiff in his Reply to deny generally the grounds alleged in a Defence by way of counterclaim, but each party must deal specifically with each allegation of fact of which he does not admit the truth (Order 19, r. 17). To this rule there are two exceptions:—

No denial or defence is necessary as to damages claimed or their amount, but they shall be deemed to be put in issue in all cases, unless expressly admitted (Order 21, r. 4).

No defendant in an action for the recovery of land who is in possession by himself or his tenant need plead his title unless his Defence depends on an equitable estate or right, or unless he claims relief upon any equitable ground against any right or title asserted by the plaintiff. But, except in those cases, it is sufficient for him to state by way of defence that he is so in possession. It shall be taken as implied in such statement that he denies, or does not admit, the allegations of fact contained in the Statement of Claim; and he may, also under that plea, rely upon any legal ground of defence which he can prove (Order 21, r. 21).

(iii.) *Confession and Avoidance*.—The pleader must not always confine himself to merely traversing. It is generally necessary for him at the trial to set up some affirmative case. If this is merely his version of the matters alleged in the Statement of Claim, he is not bound to state it in his pleading. Thus if the plaintiff says the defendant broke and entered his close



and trampled down his wheat, the defendant need not state that it was Jones, a third person, who did this; he may content himself with denying that he did it. But "the defendant must raise by his pleading all matters which show the action not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence as if not raised would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the preceding pleadings, as, for instance, fraud, Statute of Limitations, release, payment, performance, facts showing illegality either by statute or common law, or Statute of Frauds" (Order 19, r. 15).

All facts which it is alleged excuse or justify the act of which the plaintiff complains must be specially pleaded. And they must be pleaded with especial particularity and care, if the defendant is thus imputing fraud or misconduct to the plaintiff or his agents. Thus in an action of wrongful dismissal, a plea justifying the dismissal on the ground that the servant was incompetent or dishonest must state the charge specifically and in detail; so must a plea justifying the publication of defamatory words on the ground that they are true. See JUSTIFICATION. And in all these cases the plea must either justify or excuse the whole of the acts complained of, or else it must be expressly limited by some such prefix as "And in answer to paragraph 4 of the Statement of Claim," or "As to so much of the claim as alleges that, etc."

*Equitable defences* may now of course be pleaded and equitable relief claimed in any action brought in the Queen's Bench Division (Judicature Act, 1873, s. 24, subs. 2).

*Matter arising since Writ.*—Any ground of defence which has arisen after action brought, but before the defendant has delivered his Defence, and before the time limited for his doing so has expired, may be raised by the defendant in his Defence, either alone or together with other grounds of defence (Order 24, r. 1). This was formerly called "a plea to the further maintenance of the action."

Where any ground of defence arises after the defendant has delivered a Defence, or after the time limited for his doing so has expired, the defendant may within eight days after such ground of defence has arisen, or at any subsequent time by leave of the Court or a judge, deliver a further Defence setting forth the same (Order 24, r. 2). This was formerly called "a plea of *puis darrein continuance*."

Whenever a defendant alleges under either of these rules any ground of defence which has arisen after the commencement of the action, the plaintiff may deliver a confession of such defence (see Form No. 5 of R. S. C., Appendix B), and may thereupon sign judgment for his costs up to the time of the pleading of such defence, unless the Court or a judge shall otherwise order (Order 24, r. 3; and see *Houghton v. Tottenham Rwy. Co.*, 1892, W. N. 88).

*Payment into Court.*—Payment into Court is not strictly a defence; it is rather an attempt at a compromise. No such plea was known to the common law; it is entirely the creature of statute. The Judicature Act, 1873, for the first time permitted payment into Court generally in all actions. In all actions except libel and slander, a defendant is now allowed to deny all liability, while, at the same time, he pays money into Court.

Unless, however, the defendant, on paying money into Court, expressly denies liability, such payment is considered to admit the plaintiff's claim (Order 22, r. 1) to the extent of the amount so paid in (*Hennell v. Davies*,



[1893] 1 Q. B. 367); the plaintiff can have the money so paid in paid out to him at his request (r. 5); and the defendant cannot subsequently deliver any Defence denying liability (*Dumbelton v. Williams*, 1897, 76 L. T. 81). But if the defendant expressly denies liability when he pays the money into Court, then, unless the plaintiff accepts it in full satisfaction of his claim, and so puts an end to the action and has his costs taxed up to date, the money will remain in Court till the end of the trial. If the plaintiff does not accept the money paid into Court, whether paid in with or without a denial of liability, but goes on with the action, he does so at the risk of having to pay costs in case he recovers less than the amount paid in.

Hence, if the defendant pays money into Court at all, he should pay in a good round sum, more than he himself thinks the plaintiff is entitled to. The jury will find their verdict without reference to the amount paid in; indeed, neither the fact that money has been paid into Court nor the amount paid in, may now be mentioned to them (Order 22, r. 22). This rule is "most salutary and has worked well" (per Lopes, L.J., in *Williams v. Goose*, [1897] 1 Q. B. at p. 473).

In actions of libel and slander, however, a defendant is not allowed to pay money into Court at all, if he at the same time deny liability. In those actions, the payment of money into Court admits liability to the extent of the sum paid in, and the plaintiff is entitled to have that sum paid out to him at once, although he does not accept it in satisfaction of his claim (Order 22, rr. 1, 5). If, however, the plaintiff leaves the money in Court, and the jury find a verdict for a less amount, the judge at the trial may order that the excess be repaid to the defendant (*Gray v. Bartholomew*, [1895] 1 Q. B. 209). This is so, whether the payment into Court be accompanied by a plea under Lord Campbell's Act or not. For money cannot now be paid into Court under Lord Campbell's Act; the portion of sec. 2 of that Act which enabled a defendant to do so was repealed in 1879 by the 42 & 43 Vict. c. 59; and now money can only be paid into Court under Order 22. But see *Oxley v. Wilks*, 1898, 14 T. L. R. 402.

Where, however, the words are defamatory in their natural and obvious meaning, and the plaintiff by his innuendo puts on them a more defamatory meaning, the defendant may traverse the innuendo and at the same time pay money into Court, provided he makes it clear that he admits liability in respect of the words without the alleged meaning (*Mackay v. Manchester Press Co.*, 1889, 54 J. P. 22; 6 T. L. R. 16).

*Time.*—If the defendant, when entering an appearance, does not require the plaintiff to deliver a Statement of Claim, he must, within ten days after appearance, plead to the substance of the claim set out in the indorsement on the writ as best he can (Order 21, r. 7). Whenever a Statement of Claim is delivered (whether required or not), the defendant must deliver his Defence within ten days from the delivery of the Statement of Claim, or from the time limited for appearance, whichever shall be last; unless such time is extended by the Court or a judge (Order 21, r. 6), or by consent under Order 64, r. 7. There is, as a rule, no difficulty in obtaining one or two extensions for a week or so, unless the case is to be tried at the Assizes, and the commission day is drawing near, when the plaintiff will rightly insist upon the defendant consenting to accept short notice of trial, if he require further time to plead. An extension of the time for pleading may be granted, even after the time allowed for pleading has expired (Order 64, r. 7). If the time expires and no Defence has been



delivered, the plaintiff may sign judgment by default (see DEFAULT). But if he delays doing this, the defendant may put in a Defence after time, which will prevent judgment being signed; though the defendant will probably be ordered to pay all costs incurred through his delay (*Graves v. Terry*, 1882, 9 Q. B. D. 170; *Gill v. Woodfin*, 1884, 25 Ch. D. 707).

#### VI. SET-OFF AND COUNTERCLAIM.

*Set-off*.—At common law a defendant who had any cross-claim against the plaintiff could not raise it in the plaintiff's action: he had to bring a cross-action. He might, it was true, when sued for the price of goods, give evidence of a breach of any warranty, express or implied, in reduction of the price (see *Street v. Blay*, 1831, 2 Barn. & Adol. 456, and MITIGATION OF DAMAGES, vol. viii. p. 440). But that was all. Then by a statute of George II. (2 Geo. II. c. 22) he was allowed to plead a set-off in certain cases. A set-off was (and is) a liquidated cross-claim, and it could be pleaded only to a liquidated claim. It must always be specially pleaded. Both the set-off and the claim to which it was pleaded had to be mutual debts, both due between the same parties in the same right. A claim by a man personally could not be set off against a claim made against him in his representative capacity (*Stumore v. Campbell & Co.*, [1892] 1 Q. B. 314; *Nelson v. Roberts*, 1893, 69 L. T. 352; *In re Pollitt, Ex parte Minor*, [1893] 1 Q. B. 455). A claim against the estate of a man deceased could not be set off against a debt due to him in his lifetime (*Rees v. Watts*, 1855, 11 Ex. Rep. 410). But a debt due from an agent can be set off against his principal whenever the principal has allowed the agent to act as principal in the transaction (*George v. Clagett*, 1797, 7 T. R. 359; 2 Sm. L. C., 9th ed., 130; *Montagu & Co. v. Forwood Brothers & Co.*, 1893, 42 W. R. 124). Again, both debts had to be legal debts, and for a liquidated amount. If either debt sounded in damages, or was in the nature of a penalty, or was of an equitable character, there was no set-off. A debt accruing due after the commencement of the action is not within the Statute of George II., and cannot be pleaded as a set-off, even to the further maintenance of the action (*Richards v. James*, 1848, 2 Ex. Rep. 471; 17 L. J. Ex. 277). And if the debt due from the plaintiff to the defendant exceeded the amount due from the defendant to the plaintiff, the defendant could not, before 1875, recover the difference in the plaintiff's action; he could only set off an amount equal to the plaintiff's claim, and had to bring a cross-action for the balance.

*Counterclaim*.—But now, under the Judicature Act, the defendant has a very large power of counterclaiming. He may set off, or set up by way of counterclaim against the claims of the plaintiff, any right or claim, whether it sound in damages or not. Such set-off or counterclaim will have the same effect as if it were a cross-action, and the Court will pronounce one final judgment in the action, both on the original and on the cross-claim. If the amount which is found due to the plaintiff on his claim exceeds the amount established by the defendant on his counterclaim, the plaintiff will have judgment for the difference; if, however, the balance is in favour of the defendant, judgment will be given for the defendant for such balance, or for such other relief as he may be entitled to upon the merits of the case (Order 21, r. 17). There is no need for the defendant to bring a cross-action, unless his counterclaim be of such a nature that it cannot be conveniently tried by the same tribunal or at the same time as the claim. If the plaintiff can show that the counterclaim is one which cannot be conveniently disposed of in the pending action, or ought not to be allowed,



a Master will strike out the counterclaim, and leave the defendant to bring a cross-action (Order 19, r. 3; Order 21, r. 15).

A counterclaim may be for either liquidated or unliquidated damages (Order 19, r. 3); it may exceed in amount the plaintiff's claim (*Winterfield v. Bradnum*, 1878, 3 Q. B. D. 324); it may be equitable as well as legal (*Eyre v. Hughes*, 1876, 2 Ch. D. 148); a cause of action which has accrued to the defendant since the writ was issued can be pleaded as a counterclaim (*Beddall v. Maitland*, 1881, 17 Ch. D. 174). To a joint claim by two plaintiffs, a separate counterclaim against each of them will be allowed (*M. S. & L. Rwy. Co. and L. & N.-W. Rwy. Co. v. Brooks*, 1877, 2 Ex. D. 243). A joint claim against two partners may be set up as a counterclaim against a separate claim by one of them (*Eyre v. Moreing*, 1884, W. N. 58). Where a plaintiff brought an action against a married woman, and joined her husband as a co-defendant for conformity, a joint counterclaim by husband and wife was allowed (*Hodson v. Mochi*, 1878, 8 Ch. D. 569). But if a man sues in his own right, a counterclaim against him as a trustee or executor will, as a rule, be struck out (*Macdonald v. Carington*, 1878, 4 C. P. D. 28). The provisions of Order 18 (see JOINDER OF CAUSES OF ACTION) apply to the joinder of various claims in a counterclaim (*Padwick v. Scott*, 1876, 2 Ch. D. 736; *Compton v. Preston*, 1882, 21 Ch. D. 138). But to a claim for the recovery of land, the defendant may counterclaim for relief against forfeiture (*Warden, etc. v. Sewell*, [1893] 2 Q. B. 254).

It is not necessary that the claim raised by the counterclaim should be analogous in its nature to that made by the plaintiff. Thus, a counterclaim in tort may be pleaded in an action for breach of contract, and *vice versa* (*Stooke v. Taylor*, 1880, 5 Q. B. D. at p. 576). Nor need its subject-matter be identical with, or even connected with, the subject-matter of the claim. The claim and counterclaim may arise out of entirely different transactions, so long as they can be conveniently tried together (*Atwood v. Miller*, 1876, W. N. 11; *Macdonald v. Bode*, 1876, W. N. 23; *Quin v. Hession*, 1878, 40 L. T. 70; 4 L. R. Ir. 35). "A defendant is entitled to set up any counterclaim that is not so incongruous as to be incapable of being tried with the original action" (per Archibald, J., in *Bartholomew v. Rawlings*, 1876, W. N. 56). Thus at the Cambridge Summer Assizes, 1880, Kelly, C.B., tried an action of slander in which there was a counterclaim as to a right of shooting over the land occupied by the defendant (*Dobede v. Fisher*, *Times* for 29th July 1880). But where the writ was specially indorsed for two quarters' rent, the defendant was not allowed to set up a counterclaim for libel and slander wholly unconnected with the claim for rent (*Rotheram v. Priest*, 1879, 40 L. J. C. P. 105; 41 L. T. 558). And where the defendant brings in a third party as defendant with the plaintiff to a counterclaim, the relief thus sought must relate specifically to, or be connected with, the subject-matter of the plaintiff's claim (*Padwick v. Scott*, 1876, 2 Ch. D. 736; *Barber v. Blaiberg*, 1882, 19 Ch. D. 473).

A counterclaim is substantially a cross-action; not merely a defence to the plaintiff's action. It must be pleaded like a Statement of Claim. It may comprise several distinct causes of action (*Turner v. Hednesford Gas Co.*, 1878, 3 Ex. D. 145). The defendant must allege all material facts necessary to support his counterclaim, and what is more he must state specifically that they are pleaded by way of counterclaim (Order 21, r. 10). The plaintiff must plead to a counterclaim precisely as though he were a defendant answering a Statement of Claim. If after the defendant has pleaded a counterclaim, the action of the plaintiff is for any reason stayed,



discontinued, or dismissed, the counterclaim may nevertheless be proceeded with (Order 21, r. 16). Thus where the plaintiff's claim was held to be frivolous, the Court still granted the defendant the relief prayed for by his counterclaim (*Adams v. Adams*, 1890, 45 Ch. D. 426; [1892] 1 Ch. 369). In short, as Lord Esher, M. R., says in *Stumore v. Campbell & Co.*, [1892] 1 Q. B. at pp. 316, 317: "No doubt matter is occasionally pleaded as counterclaim which is really set-off; but counterclaim is really in the nature of a cross-action. This Court has determined that in settling the rights of parties where there is a counterclaim, the claim and counterclaim are, for all purposes except execution, two independent actions." But note that where the plaintiff for any reason fails to deliver a Defence to a counterclaim, the defendant cannot sign judgment on the counterclaim in default of pleading; he must move for judgment under Order 32, r. 11 (*Higgins v. Scott*, 1888, 21 Q. B. D. 10; *Jones v. Macaulay*, [1891] 1 Q. B. 221; *Roberts v. Booth*, [1893] 1 Ch. 52). A counterclaim, moreover, cannot be disposed of under Order 14, or remitted to a County Court for trial (*Delobel-Flipo v. Varty*, [1893] 1 Q. B. 663).

*Present Distinction between Set-off and Counterclaim.*—The right of counterclaiming is thus much wider and more comprehensive than the former right of set-off. Every set-off could in fact be pleaded as a counterclaim. Yet it must not be assumed that the old law as to set-off has become obsolete. The distinction between a set-off and a counterclaim is still maintained. A set-off remains precisely what a set-off used to be under the Statute 2 Geo. II. c. 22; and every other kind of cross-claim is a counterclaim. It is perhaps unfortunate that the distinction should be preserved, but it was unavoidable. If a man die insolvent, his creditors only get a dividend on their claims, while the debtors to the estate must pay up their debts in full. If the same man be both a debtor and a creditor, he is naturally anxious to set one amount off against the other, and pay up or receive the balance only. And this he may do if he has a strict statutory right of set-off, but not otherwise. If he has only a counterclaim for the debt due to him from the estate, he must pay up his debt to the estate in full, and prove in the administration and obtain a dividend on his claim. In bankruptcy, however, or if a company is being wound up, a debtor to the estate or company may, it seems, set off a claim for unliquidated damages. But no set-off, whether liquidated or not, is allowed against a claim for calls in the winding up of a company (see ss. 75 and 101 of the Companies Act, 1862, and s. 6 of the Act of 1867; and COMPANY, vol. iii. p. 227).

Again, as a set-off is a defence proper to an action, a plaintiff who brings an action and is met by a set-off equal in amount to his claim must pay the defendant his costs of the whole action; for he has failed in the whole action. Whereas if the defendant can plead only a counterclaim for the same amount, the plaintiff will recover his costs of the claim, and the defendant only his costs of the counterclaim, which is treated as a cross-action by the defendant against the plaintiff. The proper principle of taxation in such a case is laid down by Brett, L.J., in *Baines v. Bromley*, 1881, 6 Q. B. D. at p. 695; and see COSTS, vol. iii. p. 479. Sec. 116 of the County Courts Act, 1888, does not apply to any counterclaim (*Blake v. Appleyard*, 1878, 3 Ex. D. 195; *Lewin v. Trimming*, 1888, 21 Q. B. D. 230).

There is, however, one instance at least in which a counterclaim, like a set-off under the former practice, serves only as a defence and not as a cross-action—or, to use the time-honoured metaphor, can be used only as



a shield, and not as a weapon of offence. If a debt be assigned, the debtor may in certain cases (see ASSIGNMENTS OF CHUSES IN ACTION, vol. i. at p. 361) set-off or counterclaim against the assignee a debt due from the assignor to himself; but if the amount of such set-off or counterclaim exceeds the amount of the debt assigned, the defendant can recover nothing from the assignee; he must sue the assignor for the balance (*Young v. Kitchen*, 1878, 3 Ex. D. 127). A similar rule is applied when a sovereign prince over whom our Courts has no jurisdiction (*Mighell v. Sultan of Johore*, [1894] 1 Q. B. 149) submits to bring an action in this country. The defendant is allowed to plead any set-off or counterclaim against him which is an answer to his demand; but not to recover any judgment against him for the excess, or to raise any counterclaim which is "outside of and independent of the subject-matter of" the claim (*South African Republic v. Compagnie Franco-Belge, etc.*, [1897] 2 Ch. 487; [1898] 1 Ch. 190).

*Counterclaim by a Plaintiff, etc.*—In answer to a counterclaim, the plaintiff may himself plead a counterclaim in respect of any cause of action which has accrued to him since writ, provided it arises at the same time and out of the same transaction as the counterclaim (*Toke v. Andrews*, 1882, 8 Q. B. D. 428). But he cannot do this if such cause of action had arisen before writ; in that case he must amend his Statement of Claim (*James v. Page*, 1888, 85 L. T. Jo. 157). A third party brought in as defendant to a counterclaim cannot counterclaim in the action against either plaintiff or defendant (*Street v. Gover*, 1877, 2 Q. B. D. 498; *Alcoy and Gandia Rwy. v. Greenhill*, [1896] 1 Ch. 19).

#### VII. REPLY, ETC.

If no Defence be delivered, the plaintiff may sign judgment by default (see DEFAULT, vol. iv. at p. 193). If the defendant has paid a sum of money into Court, and the plaintiff is content to accept that sum in satisfaction of his claim, he should deliver no Reply, but give the defendant a notice in Form No. 4 of R. S. C., Appendix B. If a Defence be delivered, and it contains sufficient admissions, the plaintiff may move for judgment thereon under Order 32, r. 6, or for an order that the defendant pay into Court the money which he admits is in his hands (*Neville v. Matthewman*, [1894] 3 Ch. 345; *Nutter v. Holland*, *ibid.* 408; *Compton v. Burton*, [1895] 2 Ch. 711). Next, the plaintiff's counsel must consider whether the Defence presents any answer to the claim, or whether the answer suggested is properly pleaded. If not, it may be necessary to apply to have it struck out or amended, or for particulars. If there is a counterclaim, it must be tested and contested precisely as though it were a Statement of Claim (see *ante*, p. 120). Then, again, it may be that the defendant has hit a blot in the plaintiff's pleading. If the Defence has raised some well-founded objection to the Statement of Claim, the plaintiff should set it right at once before it is too late. He may amend his Statement of Claim once without any leave, provided he does so before the expiration of the time limited for Reply, and before replying (Order 28, r. 2; and see AMENDMENT OF PLEADINGS, vol. i. p. 239). But this rule does not enable a plaintiff to add new parties or to increase the total amount claimed on the writ, or to change the place of trial (*Locke v. White*, 1886, 33 Ch. D. 308). For any such amendment leave is necessary, which can be granted in a proper case under Order 16, r. 11, or Order 17, rr. 2 and 4, or Order 28, r. 1. And a plaintiff will not be allowed to amend by setting up fresh claims in respect of causes of action which, since the issue of the writ, have become barred by the Statute of Limitations (*Weldon v. Neal*, 1887, 19 Q. B. D. 394). Where the action has been brought



on a substantial cause of action, to which a good defence has been pleaded, the plaintiff will not be allowed to amend his claim by including in it, for the first time, a trivial and merely technical cause of action, which such defence may not cover (*Dillon v. Balfour*, 1887, 20 L. R. Ir. 600). Sometimes it may be necessary for the plaintiff to amend by adding a new defendant (*Edward v. Lowther*, 1876, 45 L. J. C. P. 417; 34 L. T. 255; *Montgomery v. Foy, Morgan, & Co.*, [1895] 2 Q. B. 321). In all these cases the party amending must pay all costs occasioned by the amendment, unless the Master shall otherwise order (Order 28, r. 13).

*Drafting the Reply.*—If a Defence be delivered, with no counterclaim, the plaintiff's Reply may be a mere joinder of issue (see JOINDER OF ISSUE). Indeed, if the plaintiff desires merely to contradict the facts alleged by the defendant, it is not worth his while to deliver any Reply at all; for in that case, if no further pleading be delivered, the pleadings will be treated as closed, and all material statements of fact in the Defence will be deemed to have been denied and put in issue (Order 27, r. 13).

But the plaintiff must be careful not to join issue merely, where he ought to allege new facts or raise an objection in point of law. For the effect of joining issue is merely to *deny*; it does not confess and avoid. It is simply a comprehensive and compendious *traverse*. "The plaintiff must raise by his pleading all such grounds of reply as, if not raised, would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the preceding pleading, as, for instance, fraud, Statute of Limitations, release, payment, performance, facts showing illegality, either by statute or common law or Statute of Frauds" (Order 19, r. 15). "The Reply is the proper place for meeting the Defence by confession and avoidance" (per James, L.J., in *Hall v. Eve*, 1876, 4 Ch. D. at p. 345).

The plaintiff must not in his Reply raise any new ground of claim, or allege any fresh fact inconsistent with his previous pleading (Order 19, r. 16). To do so would be a *departure*. But he may in his Reply explain and define the nature and extent of the claim made in his previous pleading; for this is only what was formerly called a new assignment (Order 23, r. 6).

*Reply and Defence to Counterclaim.*—Where a counterclaim is pleaded, the Reply to it is really a Defence, and is therefore subject to the rules applicable to a Defence (Order 23, r. 4). The plaintiff is not allowed in his Reply to deny generally the facts alleged by the defendant in a counterclaim; he may not join issue on it; "he must deal specifically with each allegation of fact of which he does not admit the truth, except damages" (Order 19, r. 17). He must plead to it as though it were a Statement of Claim (*Benbow v. Low*, 1880, 13 Ch. D. 553; *Green v. Sevin*, 1879, 13 Ch. D. 589). He may even counterclaim to it in certain cases (see *ante*, p. 128). He may pay money into Court in satisfaction of it; and such a payment will have the same effect on costs, etc., as payment into Court by a defendant (Order 22, r. 9; *Hutchinson v. Barker*, 1894, 71 L. T. 625). He may set up any ground of defence to a set-off or counterclaim which arises after the Defence or the Reply has been delivered in the manner indicated in rr. 1 and 2 of Order 24, *ante*, p. 123.

*Rejoinder, etc.*—The defendant's answer to the Reply is called a Rejoinder; but it is seldom more than a joinder of issue, even where a counterclaim has been pleaded. Further pleadings are possible; there can be a Surrejoinder, a Rebutter, and a Surrebutter; but they are very seldom met with now. Issue should never be joined on a joinder of issue. Still the principle of rule 15 of Order 19 (*ante*, p. 123) applies to all these subsequent pleadings.



Hence, if the defendant desires to give evidence at the trial of any fresh fact by way of confession and avoidance, in answer to the plaintiff's Reply, he must allege it specially in his Rejoinder. But he can only do this by leave; he must satisfy the Master that a special Rejoinder is necessary. No pleading subsequent to Reply, other than a joinder of issue, can be pleaded without leave of a Master, and then only upon such terms as he shall think fit (Order 23, r. 2).

*Time.*—The plaintiff must deliver his Reply, if any, within twenty-one days after the Defence or the last of the Defences has been delivered, unless the time be extended by consent or by order (Order 23, r. 1; Order 64, r. 8). A "Reply and Defence to Counterclaim" must be delivered within the same period (*Rumley v. Winn*, 1889, 22 Q. B. D. 265). A Rejoinder and every other pleading subsequent to Reply must be delivered, if at all, within four days after the delivery of the previous pleading, unless the time be extended by order or consent (Order 23, r. 3). As soon as any party has simply joined issue upon the preceding pleading of the opposite party without adding any further or other pleading thereto, the pleadings as between such parties are closed (Order 23, r. 5), and the case is ready for trial.

The judge at the trial has full power to add, strike out, or substitute a plaintiff or defendant (Order 16, r. 12), or to amend any defect or error in any pleading or proceeding on such terms as may seem just (Order 28, rr. 1, 6, 12; and see *Nicholson v. Brown*, 1897, W. N. 52).

#### VIII. TRIAL WITHOUT PLEADINGS.

It is not necessary that there should in every case be formal pleadings delivered. Yet where they are dispensed with, some document is generally prepared which takes the place and has the effect of pleadings. Thus where there is no real dispute as to the facts, the parties to any cause or matter may concur in stating the questions of law which have arisen, in the form of a "special case" for the opinion of the Court (Order 34, rr. 1, 2). So where the parties are agreed as to the questions of fact to be decided between them, they may, after writ issued and before judgment, by consent obtain an order from a Master to proceed to the trial of all or any such questions of fact without formal pleadings. The questions of fact are then, as a rule, stated for trial in what is technically called "an issue"; and such issue is entered for trial and tried in the same manner as any issue joined in an ordinary action. Then, again, the Court or a judge may direct an issue to be prepared on any question of fact (Order 33, rr. 1, 2). But this is seldom done with respect to any main question in the action. Issues under this Order are usually directed to determine whether a particular person was or was not a member of the defendant firm at the time the contract sued on was entered into with that firm, or to determine the liability of a person summoned as a garnishee, or to decide between rival claimants to property taken in execution by the sheriff or in the hands of a stakeholder, or otherwise in aid of execution. They generally deal only with some subsidiary question which arises after the main questions in the action have been decided. They do not therefore take the place of pleadings.

A new Order was, however, made in November 1893 (Order 18A), which enables a plaintiff, if he thinks fit, to proceed to trial without pleadings, provided the indorsement of his writ contains "a statement sufficient to give notice of the nature of his claim, or of the relief or remedy required in the action," and also a statement that "if the defendant appears, the plaintiff intends to proceed to trial without pleadings." The defendant may nevertheless apply by summons that pleadings shall be delivered. If he does



not, he must give notice to the plaintiff if he intends to rely at the trial on any set-off or counterclaim, or on any of the defences, specified in rule 5 of that Order; and in such notice he must state "the grounds and particulars upon which he relies." The plaintiff's "sufficient statement," and the defendant's notice stating "grounds and particulars" are very like pleadings.

At the same date (November 1893) Order 14 was re-written, and now when a plaintiff applies for summary judgment under that Order, the Master has power (r. 8), while granting leave to defend, to order the action to be set down for trial immediately, without further pleadings. But the plaintiff cannot apply for summary judgment under Order 14, unless he has previously placed on his writ a special indorsement, which is a pleading (*Anlaby v. Prætorius*, 1888, 20 Q. B. D. at p. 770). And the Master, before giving leave to defend, has before him an affidavit in which the defendant has fully disclosed his defence.

And now, by the new rules of May 1897 (Order 30, r. 1), the plaintiff must in every action not coming within Order 18A, take out a summons for directions immediately after appearance, and before he takes any fresh step in the action other than an application for an injunction, or for a receiver, or for summary judgment under Order 14. The theory is that on this summons all interlocutory matters will be considered and finally disposed of, and all directions given which are necessary before the trial. Among other directions the judge or Master on such a summons may make an order dispensing with pleadings (Order 30, r. 2). This is often done with cases in the Commercial Court. But even there before such an order is made, each party orally declares what his case is, and an "issue" is generally drawn up stating what are thus found to be the precise points in dispute between the parties. And in non-mercantile cases, the Master generally orders "points of claim, with particulars," and "points of defence, with particulars"; phrases which exactly describe what pleadings ought to be.

*In Criminal Cases.*—This subject has been fully dealt with under INDICTMENT, except as to certain special pleas which fall under the heads following:—ABATEMENT; AUTREFOIS ACQUIT; AUTREFOIS CONVICT; GENERAL ISSUE; JUSTIFICATION.

**Pleas of the Crown.**—1. This term was originally applied to those criminal offences the cognisance whereof was reserved to the King's Courts. The common law County Courts and Courts of borough and manor had jurisdiction over certain offences (*Staundforde, Pl. Cr.* 1). Those cognisable in the County Court were termed pleas of the sheriff. The pleas of the Crown appear to have been originally those reserved to the Crown on the grant of a judicial franchise, *i.e.* the offences more seriously affecting the general peace or interests of the realm or revenue. In proceedings for such matters they were declared to be *contra pacem Domini Regis* (see PEACE, THE). Magna Carta (1215, art. 24) made it illegal for sheriffs, constables of castles, coroners, or other bailiffs to hold pleas of the Crown. Such pleas were dealt with either *in curia regis* or by the justices in eyre; and the edition by Professor Maitland of the *Gloucester Eyre Roll* of 1221 illustrates the nature of the circuit of the king's justices, and the limits then already placed on local jurisdictions.

On the establishment of the commission of the peace, all criminal offences, save those cognisable in Courts leet, were treated as pleas of the Crown, and dealt with under royal commissions only, and "pleas of the



Crown" is thenceforth equivalent to criminal law (1 Steph. *Hist. Cr. Law*, 82–85).

The earlier treatises on English criminal law dealt with criminal law under the old style of pleas of the Crown. Bracton, bk. iii., is entitled *De Coronâ*; and see Glanville and Fleta.

Then follow the works of Staundforde (*Pleas of the Crown*), Coke (3 *Inst.*), Hale (*History of Pleas of the Crown*), Hawkins (*Pleas of the Crown*), and Eagle (*Pleas of the Crown*). In the nineteenth century the term has been dropped, and the works of Archbold, Chitty, Russell, and Stephen deal with the criminal law by reference to modern conceptions, and without regard to its ancient history.

2. Hale also includes under pleas of the Crown certain civil matters concerning franchises and liberties, and proposed to treat of them; but his work on this subject, if ever written, has not survived (1 *Hist. P. C.*, *Proœmium*); and causes affecting the Crown lands, revenues, and prerogatives are not now spoken of as pleas of the Crown.

**Pleasure Grounds.**—By sec. 164 of the Public Health Act, 1875, it is provided that any urban authority may purchase or take on lease, lay out, improve, and maintain lands for the purpose of being used as public walks and pleasure grounds. The 22 Vict. c. 27 facilitates grants of land near populous places for their use, for the regulated recreation of adults, and as playgrounds for children.

By 34 Vict. c. 13, repealed and re-enacted by the Mortmain and Charitable Trusts Act, 1888, proceeding on the preamble that it is expedient to facilitate gifts of land for the purpose of forming public parks, schools, and museums, it is provided that all gifts and assurances of land, up to a limited acreage, and whether made by deed or by will or codicil for such purposes, and all bequests of personal estate to be applied in or towards the purchase of land for such purposes, shall be valid, notwithstanding the Statutes of Mortmain. As to enclosing Kennington Common, see 15 & 16 Vict. c. 29.

**Pledge.**—See PAWN, where also the subject of Fraudulent Pledge is dealt with.

**Pleins pouvoirs.**—See PLENIPOTENTIARY.

**Plenary.**—The fact that a benefice is full (*plenus*) or in the possession of an incumbent. By the common law it was a good defence to an action *quare impedit* (*q.v.*), but the Statute of Westminster the 2nd, 13 Edw. I. st. 1, c. 5 (1285), provided that it should be no defence if the rightful patron's action were brought within six months. The king, however, can bring his action even after the six months have expired (2 *Inst.* 361).

**Plenary.**—A plenary cause is one of the ordinary causes in ecclesiastical law requiring a solemn order in the proceedings and the completion of all formal steps, as opposed to summary causes, which was the appellation of the causes within the cognisance of the Prerogative Court.



**Plene administravit ; Plene administravit præter**—The pleas in defence of an executor or administrator who has not assets sufficient to satisfy the debt for which he is sued. The essential part of the first, before the Judicature Acts, was that the executor had none of the testator's goods which were, at the testator's death, in his hands as executor to be administered, nor had had at the time of the commencement of the suit, or ever since that time ; and this plea, which was essential before the Judicature Acts (see *Ramsden v. Jackson*, 1737, 1 Atk. 292 ; *Erving v. Peters*, 1790, 3 T. R. 685 ; 1 R. R. 794 ; *In re Higgin's Trusts*, 1861, 2 Gif. 562), seems to be still necessary, though, in view of the amendments which may now be made in pleadings, the omission to plead this defence at the proper time would not now be fatal, as it was held to be in *Erving v. Peters*, and *Rock v. Leighton*, there cited. It has been decided, however, that an executor may now pay one debt after action brought in respect of another (*In re Radcliffe*, 1878, 7 Ch. D. 732 ; *Vibart v. Coles*, 1890, 24 Q. B. D. 364), but he may not do so after a decree for administration (*In re Barrett*, 1889, 43 Ch. D. 70 ; *In re Wells*, 1890, 45 Ch. D. 569). The rule applied also in the case of the executor of an executor, who had to plead either that the original executor fully administered, or that he himself had no assets of the first executor to make good a *devastavit* by him (*Wells v. Fyde*, 1808, 10 East, 315).

The plea of *plene administravit præter* was resorted to by an executor or administrator sued for an inferior debt who had notice of one of a superior nature, and had not assets to pay both ; the essence of the plea being that there were assets to pay the superior debt, and no more. Since 1880 specialty debts have not had any priority over simple contract debts, but such a plea may be necessary in the case of an executor or administrator sued for debt when a judgment is outstanding against the estate, and there are not assets sufficient for both. An executor or administrator should allege the facts upon which he seeks to set up a retainer, if there be no assets for that and for the debt upon which he is sued, and the existence of debts of a higher nature than the one sued for, and no assets *ultra*, must be specially pleaded ; and on this defence the plaintiff may either join issue, or reply specially, or apply under R. S. C. Order 32, r. 6, for judgment of future assets *quando acciderint*. The plaintiff, in reply to a defence of an outstanding judgment and no assets *ultra*, may reply that it has been satisfied, or that it is kept on foot collusively.

See also EXECUTORS AND ADMINISTRATORS.

[*Authorities*.—Williams on *Executors*, 9th ed., 1893 ; Bullen and Leake's *Precedents of Pleadings*, 5th ed., 1897.]

**Plenipotentiary** is, strictly speaking, a diplomatic agent furnished with full powers (*pleins pouvoirs*) for specific negotiations. In practice it has become a second title for diplomatic agents of the second class, and in the British diplomatic service, in some cases, of the third class. It no longer implies the possession of unlimited powers.

**Plough-bote**.—See ESTOVERS, vol. v. at p. 81.

**Plough-land**—Another name for a hide of land.



**Plunderage** is an obsolete term of maritime law, said to mean embezzling goods on shipboard (Lely, *Dictionary*).

**Plural.**—Unless the contrary intention appears, in statutes passed since 1850, words importing the masculine gender include females, the singular includes the plural, and the plural the singular. See 52 & 53 Vict. c. 63, s. 1.

## Pluralities.

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I. *Plurality* is the simultaneous holding by a spiritual person of two or more benefices or preferments involving the cure of souls. From the earliest times pluralists have been the object of ecclesiastical censures, for which Van Espen (ed. 1753), vol. i. p. 682; vol. iii. pp. 226, 439; and vol. iv. p. 51, may be consulted. The specially English history of the subject will be found in Lindwood, at p. 135 of the Oxford edition of 1679, and pp. 126–128 of the “Constitutions of Othobon,” in the same volume, or in Gibson’s *Codex*, tit. xxxvii. p. 903 of the Oxford edition of 1761. The present law is chiefly contained in the Pluralities Act, 1838 (1 & 2 Vict. c. 106), as amended by the Pluralities Act, 1850 (13 & 14 Vict. c. 98), and the Pluralities Acts Amendment Act, 1885 (48 & 49 Vict. c. 54).

By sec. 124 of the principal Act, and sec. 3 of the first amending Act, the term *benefice* is defined as meaning “benefice with cure of souls and none other”; and as comprising “all parishes, perpetual curacies, donatives, endowed public chapels, parochial chapelries or districts . . . belonging to any church,” any other Act to the contrary notwithstanding.

*Cathedral Preferment* is defined as comprehending every “deanery, archdeaconry, prebend, canonry, office of minor canon, priest, vicar, or vicar choral having any prebend or endowment belonging thereto, or belonging to any body corporate of persons holding any such office; and also every precentorship, treasurership, subdeanery, chancellorship of the church, or other dignity and office in any cathedral or collegiate church; and every mastership, wardenship, and fellowship in any collegiate church.

However, under 4 & 5 Vict. c. 39, s. 3, and 13 & 14 Vict. c. 98, s. 11, an honorary canonry, or any prebend dignity or office, with an endowment, if any, under £20 per annum, is not reckoned a preferment.

The enactments prohibiting pluralities are:—

1. No spiritual person with more benefices than one can hold cathedral preferment or another benefice (s. 2 of 1 & 2 Vict. c. 106).

2. No spiritual person with cathedral preferment and one benefice can hold any other cathedral preferment or any other benefice (*ibid.*).

3. No spiritual person holding “any preferment in any cathedral or collegiate church” shall hold therewith any other preferment in any cathedral or collegiate church, except an office, the duties of which are statutably or accustomably discharged by the holder of the preferment (*ibid.*).

4. No spiritual person holding a benefice can hold a second benefice, unless the following conditions are satisfied:—(a) The churches or benefices are within four miles of one another by the nearest road, and (b) the value of one does not exceed £200 (1 & 2 Vict. c. 106, ss. 4, 129; 13 & 14 Vict. c. 98, s. 1; 48 & 49 Vict. c. 54, s. 14).

5. No dean can hold the office of head of a college at Oxford or Cambridge, provost of Eton, warden of Winchester, or master of the Charterhouse (13 & 14 Vict. c. 98, s. 5);



nor any benefice, except one situate within the city or town of the cathedral or collegiate church in which he holds the deanery, and of value under £500 per annum (13 & 14 Vict. c. 94, s. 19; *R. v. Champneys*, 1871, L. R. 6 C. P. 384; and 36 & 37 Vict. c. 64, s. 1).

6. No head of a college at Oxford or Cambridge, or warden of Durham, if also holding a benefice, can hold therewith any cathedral preferment or any other benefice; or if also holding a cathedral preferment, can hold any benefice, except a benefice or preferment permanently attached to his office (13 & 14 Vict. c. 98, s. 6).

7. No minor canon (including vicars or vicars-choral) can hold with his minor canonry any benefice, except one within six miles of the cathedral or collegiate church (3 & 4 Vict. c. 113, s. 46; 4 & 5 Vict. c. 39, s. 15).

However, under sec. 2 of the principal Act, and sec. 10 of 4 & 5 Vict. c. 39, an archdeacon may hold with his archdeaconry two benefices, the population of one of which is under 3000, or the other under 500, and one of which is locally situate within the diocese; or one benefice in the diocese, and one cathedral preferment in the cathedral church of the diocese.

By 26 Hen. VIII. c. 14, s. 8, a suffragan bishop may hold two benefices. But it seems clear that this section is not now in force (13 & 14 Vict. c. 98, ss. 1, 7).

The right which thus, under certain circumstances, exists to hold two benefices can only be exercised upon a licence or dispensation being obtained from the Archbishop of Canterbury, who must be satisfied of the fitness of the person, and of the expediency of allowing the two benefices to be holden together. In case the archbishop refuses, the applicant can appeal to Her Majesty in Council (1 & 2 Vict. c. 106, s. 6).

The applicant for a dispensation must deliver to the bishop of the diocese in which each benefice is situate a certificate showing the annual value, annual outgoings, population, and relative distance of the benefices. The bishop may inquire as to the accuracy of the statements, and within one (calendar) month must deliver to the archbishop his certificate of the above facts (1 & 2 Vict. c. 106, s. 7).

The mode in which the provisions of the enactments against plurality are enforced is simply that the taking a preferment by a clergyman, which cannot under the Acts be held with his existing preferment, *ipso facto* vacates the original preferment (1 & 2 Vict. c. 106, s. 11; 13 & 14 Vict. c. 98, s. 7).

The vacancy occurs on being "admitted, instituted, or licenced," to the new preferment.

A person holding two preferments, and receiving a new one, with which he is entitled to retain one, but not both of his former preferments, must elect which he will retain, and signify his choice to the bishop in the manner prescribed in sec. 11 of 1 & 2 Vict. c. 106.

II. The subject of *non-residence*, perhaps because it is dealt with by the Pluralities Act, is usually dealt with under that heading.

An incumbent must reside on his benefice and in the house of residence, if any, belonging thereto, and his total absence during the year must not exceed three months or ninety days (1 & 2 Vict. c. 106, s. 32). There are, however, certain exemptions from this rule:—

1. The bishop can grant a licence to reside out of the house of residence if that is unsuitable, or if the incumbent owns and occupies a dwelling-house in the parish (1 & 2 Vict. c. 106, ss. 33, 43).

2. The heads of colleges at Oxford or Cambridge, the warden of Durham, or headmaster of Eton, Winchester, or Westminster, not having respectively more than one benefice with cure of souls, are exempt from any penalty for non-residence on any benefice (1 & 2 Vict. c. 106, s. 37).

3. Temporary non-residence for the purpose of discharging the duties of dean,



professor in the university of Oxford or Cambridge, chaplain to any of the Royal Family, or to an archbishop, or to the House of Commons, chancellor or vicar-general or commissary of any diocese, archdeacon, dean, sub-dean, or preacher in the Chapels Royal, preacher at the Inns of Court, provost of Eton, warden of Winchester, master of the Charterhouse, principal of St. Davids or King's College is not counted as non-residence (1 & 2 Vict. c. 106, s. 38).

4. A person holding two benefices may reside on either, and the residence of a suffragan bishop over a diocese counts as residence on his benefice (1 & 2 Vict. c. 106, s. 32, and 26 Hen. VIII. c. 14, s. 7).

5. Performance of cathedral duties by a canon, prebendary, vicar-choral, or minor canon, will justify five months' absence from his benefice (1 & 2 Vict. c. 106, s. 39).

The bishop is empowered to grant a licence for non-residence to an incumbent in the following cases:—

1. Mental or bodily incapacity;
2. Dangerous illness of wife or child;
3. No suitable residence obtainable

(1 & 2 Vict. c. 106, ss. 42, 43); and the bishop, with the confirmation of the archbishop of the province, can grant a licence of non-residence for any other reason (1 & 2 Vict. c. 106, s. 44).

In case an incumbent fails to reside on his benefice, and has neither exemption nor licence, he is liable to be proceeded against (see 32 & 33 Vict. c. 109, s. 2)—(a) For penalties under 1 & 2 Vict. c. 106, s. 32 (*Rackham v. Bluck*, 1846, 9 Q. B. 191; 16 L. J. Q. B. 82; S. C. 1 Rob. 327; (b) by monition to return and reside enforced by sequestration under 1 & 2 Vict. c. 106, ss. 54–57, 110 (*Bartlett v. Kirwood*, 1853, 2 El. & Bl. 771; *In re Bartlett*, 1848, 18 L. J. Ex. 25).

If the sequestration continues for one year, or two such sequestrations are incurred in two years, the benefice becomes void (1 & 2 Vict. c. 106, s. 58), or the bishop may appoint a curate under 1 & 2 Vict. c. 106, s. 75.

III. *Commendam*.—In former times the enactments against plurality were evaded by this means. A vacant benefice might be committed to a holder of other benefices until it could be provided with an incumbent.

Suppose an incumbent was never provided, then the temporary holder would enjoy the benefice indefinitely. The benefice was then said to be granted in commendam.

Commendams were abolished by 6 & 7 Will. IV. c. 77, s. 18 (see *Colt and Glover v. Bishop of Coventry*, 1613, Hob. 140–165, where the old law is fully stated and the different species of commendam described).

The permanent junction of two benefices is dealt with under UNION OF BENEFICES. When two benefices have been permanently united they count as one for all questions of plurality.

No spiritual person may serve more than two benefices in one day, unless in case of “unforeseen and pressing emergency,” in which case he is to forthwith report the circumstances to the bishop of the diocese (1 & 2 Vict. c. 106, s. 106; see also Canon 48).

[*Authorities*.—Phillimore, *Eccl. Law*; Gibson, *Cod.*; Lindwood; F. W. Maitland, “*Execrabilis*” in the Common Pleas, 12 *Law Quarterly Review*, 174.]

**Pluries.**—A writ of pluries (Latin, “as often”), or more fully *pluries capias*, used to issue in case a person accused of a misdemeanour was not to be found under a writ of *capias* and a writ of *alias*; that is, it was issued in the third instance after these writs had been ineffectual. In



the case mentioned, first of all a writ of *venire facias*, which is of the nature of a summons to appear, is issued, whereupon, if it appears that the party has lands in the county, a distress may be levied from time to time on these lands until he appears; but if the sheriff's return is to the effect that there are no lands in the bailiwick, then a writ of *capias* can be issued commanding the sheriff to take his body, and have him at next Assizes, which writ, if ineffectual, was formerly followed as above stated. Now, by the Crown Office Rules, 1886, r. 110, only one writ of *capias* need be issued in such cases.

**Plying for Hire.**—See CAB.

**Poaching.**—See GAME LAWS.

**Pocket Judgment.**—See STATUTE MERCHANT.

**Pocket Sheriff.**—When the sovereign appoints a person sheriff who is not one of the three nominated in the Exchequer, he is called a pocket-sheriff (1 Black. Com. 342).

**Poet Laureate.**—The custom of crowning poets, says the Abbé Resnal, is nearly as old as poetry itself (*vide Mémoires de l'Académie des Inscriptions*, 1736, vol. x. p. 507). Formerly it was the custom of our universities when conferring the degree of grammar, which included rhetoric and versification, to present the new graduate with a wreath of laurel as the ensign of the degree taken of mastership in poetry, after which he was usually styled *poeta laureatus*.

This custom was probably borrowed from the Empire, where as early as the days of Frederick I. the crowning of poets had been a custom of the emperors; and this, again, may be traced to those ancient agones or certamina of poets instituted by Domitian under the old Roman Emperors (Selden, *Titles of Honour*, 3rd ed., 1672, p. 339).

In England, since the sixteenth century, the title has been held by the king's poet laureate only, who originally was nothing more than a graduated rhetorician in the service of the king. The first mention of this royal office occurs in the middle of the fifteenth century, when John Kay, in dedicating a prose translation of the *Siege of Rhodes* to Edward IV., described himself as "hys humble poet laureate"; but in far earlier times there was a "miserable dependent" in the royal household who was called Versificator Regis. Richard Cœur de Lion's versifier was Gulielmus Peregrinus. In 35 Hen. III. we find mention of one Master Henry, the versificator, to whom arrears of salary amounting to 100 shillings were due (Madox, *Hist. of Exch.*, 2nd ed., p. 391 n.).

The two offices were undoubtedly the same. "The barbarous and inglorious name of versifier" was, as Warton suggests, probably exchanged for the more elegant and polite one of poet laureate, at the wish of the versifier himself, in the fourteenth century. The office does not seem to have become permanent until 1630, when the letters patent under which the present office is held were granted.



The duties never seem to have been many. Laurence Eusden, "by very few been read, by fewer praised," introduced the practice of celebrating the king's birthday in an ode. This ridiculous custom, though it evoked the anathemas of Warton and Gibbon, even in an age when "the best of kings" afforded "the most just and copious theme for panegyrick," was kept up until the death of Pye in 1813. Sometimes the office has been held together with that of historiographer. In 1486 Andrew Bernard held the two offices, and so later did Dryden and Shadwell. But if the duties of the versifier royal have been few, his wages have been correspondingly small. In 41 Hen. III., Master Henry de Abrinces, the versifier, received 6d. per day, paid, it seems, half-yearly. In 1615, James I. granted his laureate a yearly pension of 100 marks, which was increased by letters patent of Charles I. to £100, with an additional grant of one tierce of Canary Spanish wine, to be taken from the king's store of wine yearly. Early in the present century Pye was content to commute the grant of wine for an addition of £27 to his annual stipend. The present laureate receives £72 per annum.

[*Authorities*.—Selden, *Titles of Honour*, 3rd ed., 1672; *Mémoires de l'Académie des Inscriptions*, 1736; Warton, *History of English Poetry*, 1824; Disraeli, *Curiosities of Literature*, 1824; *Encyclopædia Metropolitana*, art. "Laureate," 1845.]

**Poison.**—1. Poisoning was punished by boiling alive under an Act passed in 1530 (22 Hen. VIII. c. 9), in consequence of a wholesale case of poisoning in the Bishop of Rochester's household, and the offender was boiled to death. The punishment was altered in 1547 (1 Edw. VI. c. 12), and murder by poisoning was directed to be treated like any other kind of murder; and so the law has remained ever since.

It is felony—(a) to administer or cause to be administered to, or to be taken by, any person, any poison or destructive thing with intent to commit murder; and (b) to attempt to administer or to cause to be administered, or to be taken by, any other person, any poison or destructive thing with intent to commit murder; (c) unlawfully to use chloroform, laudanum, or any stupefying or overpowering drug on another with intent to commit or assist another in committing an indictable offence. The maximum punishment in either case is penal servitude for life (24 & 25 Vict. c. 100, ss. 11, 14, 22).

Unlawfully and maliciously administering to another any poison or destructive or nauseous thing is (d) felony punishable by a maximum of ten years' penal servitude, if the intent is to endanger life or inflict grievous bodily harm; or (e) misdemeanour punishable by a maximum of five years' penal servitude, if the intent is to injure, aggrieve, or annoy the recipient. On a trial for a felony, if the evidence so warrants, the jury may acquit of the felony and convict of the misdemeanour (24 & 25 Vict. c. 100, ss. 23–25).

As to the case of poisons to procure miscarriage, see ABORTION. As to the use of poisons, etc., to assist in committing sexual offences, see *R. v. Wilkins*, 1861, L. & C. 88, and RAPE.

Administration of poison, to be within these enactments, need not be by the hand of the accused. It may be sent through an innocent or guilty agent, or put where the recipient would be likely to take it as medicine, or food, or drink (*R. v. Williams*, 1844, 1 Den. C. C. 39; *R. v. Michael*, 1840, 2 Moo. C. C. 120; and see Archbold, *Crim. Pl.*, 21st ed., 720).



Under the Poisoned Grain Act, 1863 (26 & 27 Vict. c. 113), penalties recoverable summarily are imposed—(1) on persons who offer or expose for sale any grain, seed, or meal steeped in or mixed with a poisonous ingredient calculated to destroy life; (2) on persons knowingly and wilfully sowing, or placing on any ground or exposed place any grain, seed, or meal so poisoned. Half the penalty may be awarded to an informer not a constable, and an indemnity may be given to witnesses. The Act does not apply to the sale or use of poisonous solutions, infusions, or ingredients for dressing, protecting, or preparing grain or seed for *bond fide* use in agriculture, or of grain or seed prepared therewith, such as arsenic, which is used to steep wheat (s. 4) (14 & 15 Vict. c. 13, s. 3).

Under the Poisoned Flesh Prohibition Act, 1864 (27 & 28 Vict. c. 115, s. 3), poisoned flesh may not be set, laid, put, or placed on any land, except for rats, mice, and small vermin, if placed in a dwelling-house or enclosed garden attached thereto (or in drains attached thereto to which dogs cannot enter), or in the inside of stacks of agricultural produce. See DOGS.

Under the Poisoned Grain Act, 1863 (26 & 27 Vict. c. 113), it is unlawful to use poison to kill game (see GAME LAWS, vol. vi. p. 43), or to destroy salmon or any other fish in rivers or ponds (24 & 25 Vict. c. 97, s. 32; c. 109, s. 5; 36 & 37 Vict. c. 71, s. 12; and see FISH, vol. v. p. 359).

The wilful and unlawful administration of poisonous or injurious drugs to horses, cattle, or other domestic animals, is summarily punishable if not done by the owner or a person acting under his authority (39 & 40 Vict. c. 13). The Act is cumulative on other penalties of the law for injury to animals, but does not apply to prescriptions by horse doctors. It was passed to stop the practice by coachmen of giving arsenic with the object of improving the coats of their horses.

2. Special restrictions are placed by law on the sale of certain poisons. The sale of arsenic, and all colourless poisonous preparations of it, is regulated by 14 & 15 Vict. c. 13. The seller must enter in a book the particulars of sale (s. 1), and must not sell to an unknown person or a person under age (s. 2); and must sell it coloured with soot or indigo, except for use in agriculture, or purposes for which the admixture would render it useless (s. 3). The Act does not apply to medical prescriptions.

The Pharmacy Act, 1868 (31 & 32 Vict. c. 121), contains a scheduled list of poisons, classified under two heads:—

(a) Arsenic, and its preparations; prussic acid; cyanides of potassium and all metallic cyanides; strychnine, and all poisonous vegetable alkaloids and their salts; emetic tartar; corrosive sublimate; cantharides; saon, and its oil; ergot of rye, and its preparations.

(b) Oxalic acid; chloroform; belladonna, and its preparations; essential oil of almonds, unless deprived of its prussic acid; opium, and all preparations of opium or of poppies.

The Pharmaceutical Society of Great Britain may, by resolution, declare that any article therein named should be deemed a poison; and the resolution, if approved by the Privy Council, and published in the *London Gazette*, operates as an addition to the schedule (31 & 32 Vict. c. 121, s. 2).

Under these powers (part 1) the following poisons have been added to the schedule:—

Preparations of prussic acid, and of cyanide of potassium, and all metallic cyanides of strychnine and of atrophine (all these are put into the first part of the schedule); and also preparation of corrosive sublimate, red oxide (red precipitate) of mercury, ammoniated mercury (white precipitate), all compounds containing a scheduled poison prepared or sold to destroy



vermin, tinctures and all vesicating liquid preparations of cantharides (approved resolution, gazetted 21st December 1869); choral hydrate, and its preparations (approved resolution, gazetted 14th December 1877); nux vomica, and its preparations (approved resolution, gazetted 28th July 1882); morphine, and its preparations. The vermin killers fall into that part of the schedule to which their poisonous ingredients belong.

No person may sell, or keep open shop for retailing, dispensing, or compounding any scheduled poison unless qualified and registered as a pharmaceutical chemist, or chemist and druggist (s. 1); and in dealing with such poisons or compounds containing an appreciable quantity of them, the person authorised must comply with the regulations of the Act as to keeping and selling (s. 15), which are as follows:—

(a) All the scheduled poisons must, whether sold by wholesale or retail, be distinctly labelled with the name of the article, the word poison, and the name and address of the seller.

(b) Poisons in the first part of the schedule, or added thereto, may not be sold to a person unknown to the seller unless introduced by a person known to him, and before delivery entry must be made in the poison-book of full particulars as to the sale.

The regulations do not apply to wholesale for export, or to retail dealers in the ordinary course of trade (so far as concerns the label on the package, nor as to the formalities as to poisons within the first part of the schedule), and do not affect the Arsenic Act, 1851.

The regulations, moreover, do not apply to medicine supplied by a legally qualified medical practitioner or apothecary, or dispensed by a person registered under the Pharmacy Acts, if it is distinctly labelled with the name and address of the seller, and the ingredients are entered, with the name of the person to whom it is sold or delivered, in a book kept for the purpose (31 & 32 Vict. c. 121, s. 17; 32 & 33 Vict. c. 11, s. 3). The rights of veterinary surgeons are also preserved (31 & 32 Vict. c. 121, s. 16; 32 & 33 Vict. c. 117, s. 1), as are those of vendors of medicines containing poisons which are sold under letters patent, but not sellers of proprietary articles subject to medicine stamp duty. The result of recent judicial decisions is to prevent anyone but chemists from selling proprietary articles containing poison, and to require them to be labelled, however little they may contain of the scheduled poisons (*Pharmaceutical Society v. Armson*, [1894] 1 Q. B. 720; *Same v. Piper*, [1894] 1 Q. B. 686; *Same v. Delve*, [1894] 1 Q. B. 71).

The person on whose behalf a poison is sold is liable for the acts of his servants with respect to the regulations (*Same v. Wheeldon*, 1890, 24 Q. B. D. 683).

The penalty for breach of the regulations recoverable before a Court of summary jurisdiction is a fine not exceeding £5 for the first offence, and not exceeding £10 for a second or subsequent offence (31 & 32 Vict. c. 121, s. 17).

The penalty for selling poisons without qualification is £5, recoverable by action by the Pharmaceutical Society (s. 15).

3. Independently of statute, it is the duty of persons who possess poisons to take care that they are so securely kept as not to cause injury to others. The rule is the same as with respect to other dangerous things acquired by a man for his own purposes. The most recent decision touching this liability, so far as concerns owners of property, is *Ponting v. Noakes*, [1894] 2 Q. B. 281. And carelessness in the prescription or administration of poisons, if attended with fatal result, exposes the negligent person to



indictment for manslaughter, and, in any event, gives a cause of action to a person directly injured thereby (*Stretton v. Holmes*, 1890, 19 Ont. 286; *George v. Skivington*, 1869, L. R. 5 Ex. 1). An appeal is now pending before the Privy Council in which the whole of this question is fully raised (see Beven on *Negligence*, 2nd ed., 1406). If the negligence is sufficiently gross and is fatal, the negligent person may be convicted of MANSLAUGHTER (*R. v. Spencer*, 1867, 10 Cox C. C. 525). For medico-legal notes on poisons, see TOXICOLOGY.

**Police, Borough.**—The system of police in towns corporate rested until 1835 on the common law as modified by the Statute of Winchester and local Acts (see CONSTABLE, vol. iii. p. 301). The first systematic attempt to constitute a police force was made in 1829 for the METROPOLITAN POLICE DISTRICT. Under the Municipal Corporations Act, 1835, a watch committee was established for each borough, which was given the appointment and control of the police therein; and this system was expressly saved on the establishment of county police (2 & 3 Vict. c. 93, s. 24), and is still continued under Part IX. of the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50).

The watch committee is appointed by the town council, and consists of the mayor and not over one-third of the council, acting by a majority and having a quorum of three. It appoints the borough constables, and can suspend or dismiss them and regulate their discipline and fix their salaries, subject to the approval of the council, and may give them additional duties in addition to these as police, including duties as FIRE POLICE (see 19 & 20 Vict. c. 69, s. 7; 45 & 46 Vict. c. 50, Part IX.), inspectors of common lodging-houses or explosives, or as to diseases of animals, weights and measures, dairies and cowsheds, food and drugs, etc. To them was added in 1893 (56 & 57 Vict. c. 10) a provision as to employing constables as firemen. The annual reports of the inspectors of constabulary (Parl. Pap. 1897, C. 207) show the mode in which this power has been exercised.

Reports made by the police in discharge of any of their duties are privileged (*Andrews v. Nott Bower*, [1895] 1 Q. B. 888). Quarterly returns as to the borough force must be made to the Home Office (45 & 46 Vict. c. 50, s. 192).

The provisions as to station houses, etc., have already been treated under LOCK-UPS.

The Towns Police Clauses Act, 1847 (10 & 11 Vict. c. 89), provided (s. 6) for the appointment of constables by town commissioners where constables were not appointed under the County Police Acts of 1839 and 1840. Since the latter Acts were made general and compulsory in 1856, no occasion arises for having a separate police force in a non-municipal urban district. Hove, the only place which has such a force, is now applying for a charter. An urban district council if it needs extra police can apply for them under sec. 7 of the Act of 1847. Secs. 8–20 provide for the powers, duties, and discipline of constables appointed under that Act.

Boroughs of whatever size within the metropolitan police district have no separate police force, *e.g.* Croydon, Richmond, and West Ham.

In the case of boroughs outside that district to which a new charter is granted under the Municipal Corporations Act, 1882, a new separate police force may not be established unless the borough contained 20,000 or more inhabitants at the date of the last census before the charter (45 & 46 Vict. c. 50, s. 215); and all boroughs which at the census of 1881 had a



population under 10,000 were in 1889 amalgamated for police purposes with the county in which they were situate (51 & 52 Vict. c. 41, s. 39 (1)), and the functions of the watch committee as to the police went to the county police authority, and the constables passed over to the county force (s. 118). These enactments apply even to counties of cities or towns.

A borough entitled to have a separate police force may contract with the police authority of the county in which it is situate or to which it adjoins for the establishment of a consolidated police force, on terms fixed by an Order in Council. The arrangement may be terminated by the sanction of a Secretary of State (3 & 4 Vict. c. 88, ss. 14, 15; 19 & 20 Vict. c. 69, ss. 5, 20). The consolidated force is governed by the chief constable of the county.

Many boroughs, including the county boroughs of Dudley, West Bromwich, Bury, and Gloucester, have elected to be watched by the county police, or to consolidate their forces with the county force (Parl. Pap. 1897, C. 207).

The condition of a borough police force may be the subject of Home Office inquiry (*e.g.* Manchester, 1898), and is annually reported on by the inspectors of constabulary (19 & 20 Vict. c. 56, s. 15; Parl. Pap. 1897, C. 207). If the report is satisfactory, the Home Secretary certifies efficiency. If he refuses to do so, he states his grounds, and the borough forfeits to the Exchequer the amount certified as half the cost of pay and clothing of the force for the year (1856, c. 69, s. 16; 1888, c. 41, ss. 25, 34).

Borough constables on appointment make a declaration before a borough justice (31 & 32 Vict. c. 72, s. 12; 45 & 46 Vict. c. 50, s. 190); and when sworn in have not only in the borough but in the county of which it is part, and in any county or borough within a radius of seven miles from their own borough, all the powers, duties, liabilities, and privileges of a constable at common law or by statute for the districts named, and are subject to the lawful commands of any justice in any such district in which they are called on to act (45 & 46 Vict. c. 50, s. 191).

They are also entitled to arrest disorderly persons or persons whom they have just cause to suspect of intending to commit felony (45 & 46 Vict. c. 50, s. 193). See ARREST. Assault on or resistance to borough constables is punishable summarily under sec. 195 of the Act of 1882, and also under sec. 20 of the Towns Police Clauses Act, 1847, and sec. 12 of the Prevention of Crimes Act, 1871, as well as on indictment. See ASSAULT.

Borough constables may vote but not canvass at parliamentary or municipal elections (1856, c. 69, s. 9; 1887, c. 9; 1893, c. 6), but are not entitled to the franchise when living in cubicles in police barracks (*Barnett v. Hickmott*, [1895] 1 Q. B. 691). For neglect of duty they may be convicted summarily (45 & 46 Vict. c. 50, s. 194), or may be suspended, fined, or reduced in rank by the watch committee (22 & 23 Vict. c. 32, s. 26).

The salaries, wages, and allowances of the borough constables, rewards for activity, and allowances on retirement are regulated by sec. 140 and Sched. 5 of the Municipal Corporations Act, 1882, and the Home Office Order referred to under POLICE, COUNTY. The expense of the force is defrayed out of the borough fund, fed by the borough rate or a watch rate not exceeding 8d. in the £.

And where the force is efficient half the cost of pay and clothing is paid to the borough by the county treasurer out of the local taxation grant (51 & 52 Vict. c. 41, ss. 24, 25). Where additional police have to be drafted on to the borough on an emergency (under 53 & 54 Vict. c. 45, s. 25) half their cost comes within this provision (*R. v. Yorkshire West Riding County Council*, [1895] 1 Q. B. 805).



The superannuation and pensioning of the borough police is regulated by the Police Acts, 1890 (53 & 54 Vict. c. 45) and 1893 (56 & 57 Vict. c. 10), and the contribution of the borough to the pension fund is prescribed by General Order of the Home Secretary of 19th December 1893 (St. R. & O. 1893, p. 461). To this fund are also carried deductions and stoppages from pay and allowances for service of process, etc., and fees (22 & 23 Vict. c. 32, s. 11; 53 & 54 Vict. c. 45, ss. 15, 20, 21, 23, 36).

Special constables are appointed for boroughs under sec. 196 of the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), from among persons not legally exempt from the common law office of constable. The appointment is made annually in October by two or more justices having jurisdiction in the borough. They cannot be called on to act except under a justices' warrant reciting the insufficiency of the borough police force. They are entitled to remuneration if they act (45 & 46 Vict. c. 50, Schedules 4, 5).

**Police, City.**—See METROPOLITAN POLICE DISTRICT.

**Police, County.**—The early history of county police is dealt with under the heads CONSTABLE and HEADBOROUGH.

In 1831 (1 & 2 Vict. c. 41) provision was made for the appointment and swearing in of persons (not legally exempt from serving the office of constables) by two or more justices for any district, having a separate commission of the peace, on information that disturbances existed or were apprehended (ss. 1, 2). Notice of appointment must be at once given to the Home Secretary, who also, on representations of need, can direct exempted persons to be sworn in (ss. 2, 3). The Act prescribes fully the duties and powers and pay of the special constables, and the mode of discontinuing their services (*R. v. Porter*, 1841, 9 Car. & P. 778). They can act outside the parishes in which they reside (5 & 6 Will. IV. c. 43). In 1838 (1 & 2 Vict. c. 80) provision was made for appointing and paying special constables to keep order among labourers employed in constructing railways, canals, and other public works. The expenses are payable by the undertakers, under order of the county treasurer, made after notice to the undertakers.

The present county police system was established under a series of Acts beginning in 1839 (2 & 3 Vict. c. 93), and going down to 1890.

The Acts at first were applied partially and tentatively, but have been made general and compulsory (19 & 20 Vict. c. 56, s. 1), and apply to all administrative counties created under the Local Government Act, 1888, excepting the county of London and metropolitan police district, but including the administrative subdivisions of counties at large, *e.g.* the Ridings of Yorkshire, the parts of Lincolnshire, the eastern and western divisions of Suffolk and Sussex, and the divisions of Cambridgeshire and Northamptonshire, and the new administrative county of the Isle of Wight. The non-municipal liberties of counties, which used to have separate police forces, *e.g.* Havering-atte-Bower and Ripon, were, in 1889, merged in the county for police purposes (2 & 3 Vict. c. 93, ss. 27, 28; 51 & 52 Vict. c. 41, s. 48).

The police authority in counties was, from 1840 till 1889, the justices in Quarter Sessions. It is now the standing joint-committee appointed annually by the County Council and the justices in equal numbers from each body (51 & 52 Vict. c. 41, s. 30).

The authority appoints a chief constable, and fixes the number of



superintendents, officers, and men, by reference to the needs of the county, subject to the approval of the Home Secretary, and divides the county where necessary into police districts (*Ex parte Knowling*, 1865, 11 Jur. N. S. 443; *Ex parte Leicestershire C. C.*, [1891] 1 Q. B. 53), and fixes the number of constables for each district, subject to like approval. Where such districts are formed, the general expenditure on police is divided from the local expenditure (1840, c. 88, ss. 27, 28; 1856, c. 69, s. 4), and the former is collected by a general county rate, and the latter by a rate for the district in which it is incurred; *i.e.* when the local taxation grant does not cover the whole cost of police. Where such districts are not formed, the police are usually distributed with reference to the petty sessional divisions of the county under a superintendent for each division. Monthly returns are made to the police authority of the disposition and numbers of the force (3 & 4 Vict. c. 88, ss. 31, 32).

The discipline of the force is in the hands of the CHIEF CONSTABLE, subject to the approval by the police authority of the regulations framed by him. He appoints his subordinates and the petty constables, but is subject to rules for the government, pay, clothing, accoutrements, and necessaries of the force made under sec. 3 of the Act of 1839 by the Home Secretary in 1889, which are printed in Statutory Rules and Orders, Revised, vol. v. p. 162. These rules also state the qualifications of the chief and other constables. All persons employed in the police are exempt from service on the militia and on juries, and bound to devote themselves wholly to their police duties or such extra duties as may be lawfully imposed (1839, c. 93, s. 11; 1856, c. 69, s. 7; *R. v. Jarvis*, 1854, 3 El. & Bl. 640).

The county constables have all the common law powers of constables, and all the statutory additions to these powers, with respect to the prevention of crime and the pursuit and arrest of offenders. Their powers as to ARREST and BAIL have already been treated under these heads.

The powers and duties of the police are the same as those under the Special Constables Act, 1831, *i.e.* for the whole county they have all the powers of common law constables and all statutory powers, including those specified under the title ARREST.

Warrants of commitment as distinct from warrants of arrest are directed generally to the constables of the force, and their execution is regulated by 3 & 4 Vict. c. 88, s. 33.

Resignation without leave and neglect of duty are summarily punishable, as are refusal to deliver up accoutrements on discharge, personation of constables, and harbouring them in licensed premises when on duty (1839, c. 88, ss. 12-16).

Additional constables may be appointed at the request and cost of individuals, but subject to the orders of the chief constable (2 & 3 Vict. c. 93, s. 19), and discontinued on a calendar month's notice to the chief constable.

They must not canvass, but may vote at parliamentary or local government elections (1839, c. 93, s. 9; 1856, c. 69, s. 9; 1893, c. 6). They do not act within boroughs maintaining a separate police force, except where the county and borough forces are consolidated (19 & 20 Vict. c. 69, s. 6).

Parts of a county inconveniently situate may be policed by the force of another county (1840, c. 88, s. 2), and provisions were made in 1858 (21 & 22 Vict. c. 68) as to detached portions of counties, which are now for the most part spent or superseded by the Local Government Acts of 1888 and 1894.

So far as not covered by the local taxation grant, the cost of the force is defrayed by a police rate levied by the County Council on the whole



county, subject to the provisions already mentioned as to local police rate, and collected from the guardians of the poor (7 & 8 Vict. c. 33); but it is not collected in parts of counties lying within the metropolitan police district nor in any Quarter Sessions borough subject to the Municipal Corporations Acts which maintains a separate police force (2 & 3 Vict. c. 93, s. 24; 3 & 4 Vict. c. 88, ss. 3, 14, 15); and see POLICE, BOROUGH.

The basis of the rate is the same as for the county rate. The expense to be included is not merely pay or salary and accoutrements, horses, etc., but also reasonable allowances for extraordinary expenses necessarily incurred in apprehending offenders or executing police duties. An account of allowances made by the justices in each division is kept and remitted to the county treasurer for proper audit (1839, c. 93, s. 18; 1840, c. 88, s. 18).

The efficiency of the force is ensured by annual inspection and report by inspectors of police appointed by the Crown (19 & 20 Vict. c. 69, s. 15), on which the Home Secretary grants or withholds, for reasons stated by him, his certificate of efficiency. If it is withheld, the county forfeits to the Exchequer the amount certified as half the cost of pay and clothing of the force for the year.

The pensions and superannuation of the police are now regulated under the Police Acts of 1890 and 1893 (see POLICE, BOROUGH).

As to the powers of the police authority, see *R. v. Leigh*, [1897] 1 Q. B. 132.

## Police Courts.

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The words "Police Court" here mean petty sessions of the peace held in the metropolis and certain large towns by barristers specially appointed and paid as magistrates.

"Petty sessions" held by the unpaid magistracy are the subject of another article (p. 69).

ESTABLISHMENT.—The first establishment of Police Courts was in London. The city of London being under the jurisdiction of the Lord Mayor and aldermen, who exercise the office of justices of the peace under charter of Edward IV., provision was made in 27 Eliz. c. 5 (not printed) for the good government of Westminster. By 29 Geo. II. c. 25, the dean or high steward was enabled at a Court leet yearly to appoint eighty residents to be constables, and also a high constable, and an "annoyance jury" to present annoyances and other offences. By 14 Geo. III. c. 90, better regulations for lighting and watching Westminster and parts adjacent were made. In 1792 the Crown was empowered by 32 Geo. III. c. 53 to cause seven public offices to be established in specified metropolitan parishes, and appoint at each office three fit persons, being justices for Middlesex and Surrey, to execute the office of justice of the peace, together with such other justices as might think proper to attend (s. 1); one or more of the appointed justices to attend at each public office every day during prescribed hours. No fees were to be taken afterwards by any other justices within the limits of the Bills of Mortality or certain specified parishes under a penalty; except for licensing alehouses, or at Bow Street, or for enforcing payment of taxes or



assessments, or for offences cognisable before a justice by virtue of any statute for the regulation of the parish (s. 3), fees and fines were to be paid to a receiver (ss. 4, 5) appointed by the Crown. Salaries were to be paid to the justices, clerks, and peace officers employed at the offices. The justices might employ at each office six constables. The Act, being temporary, was continued by 33 Geo. III. c. 75. These Police Acts were repealed, and, in substance, re-enacted by 42 Geo. III. c. 76, which raised the salaries of the magistrates, and the wages of the constables employed at each Court. The police were, however, insufficient. One of the magistrates writing in 1797 on the subject said: "At present the system of the nightly watch is without energy, disjointed, and governed by almost as many different Acts of Parliament as there are parishes, hamlets, liberties, and precincts within the Bills of Mortality." He estimated the number of metropolitan watchmen outside the city to be 1241 (*The Police of the Metropolis*, by P. Colquhoun, 5th ed., London, 1797, at p. 100). He also directed attention to the want of police to check offences then rife on the Thames; and the 39 & 40 Geo. III. c. 88 was passed, under which a police office was established at Wapping New Stairs, and three justices were appointed at a salary to hear and determine such offences. Seven constables might be employed at that office, and many special provisions applicable to the river were made.

10 Geo. IV. c. 44 substituted a "new and more efficient system of police," enacting that the Crown might "cause a new police office to be established" in the city of Westminster, and appoint two fit persons as justices of Middlesex, Surrey, Hertford, Essex, and Kent, although without qualification by estate, at a salary (ss. 1-3). Parishes named are constituted the METROPOLITAN POLICE DISTRICT, and a "sufficient number of fit and able men" shall from time to time be appointed as a police force for the whole, sworn to act as constables and to obey the lawful commands of the said justices (s. 4), who may make regulations relative to the force, and suspend or dismiss men remiss or negligent (s. 5). The new police were to supersede the watchmen, and take over their arms and watch-boxes (s. 19). A receiver appointed by the Crown (s. 10) at a salary has to receive all sums of money applicable to the purposes of the Act, to pay the police (s. 12), contract for the purchase or renting of land or buildings (ss. 16, 17). Penalties imposed under the Act are to be paid to him (s. 37), and also the proceeds of a police rate, which (by s. 23) justices may command the overseers of the poor to levy and collect as a poor rate (ss. 24, 25, 26, 30, 31, 32), subject to appeal (s. 33). He must give security (s. 10) and furnish accounts (s. 11), to be annually laid before Parliament (s. 29). Provisions are made in case of the removal or death of the receiver as to the recovery of such moneys due from him (s. 14), or from his representatives (s. 15).

2 & 3 Vict. c. 47, after reciting that the system of police established under 10 Geo. IV. c. 44 had been found "very efficient," and might be yet further improved, and repealing the 29 Geo. II. c. 25, enables additions to be made to the police district by Order in Council (s. 2), and provides that the justices appointed under that Act may be appointed justices for Buckinghamshire and Berkshire, and be styled "The Commissioners of Police of the Metropolis" (s. 4); and the constables of the metropolitan force shall have the powers of a constable in those counties and on the river Thames within or adjoining Middlesex, Surrey, Berkshire, Essex, and Kent, and the city of London, and the waters, docks, and landing-places adjacent (s. 5). Provisions are made for payment out of the Consolidated Fund of the increased charge of the establishment (s. 6), constables being sworn to act



within the Royal palaces and ten miles thereof (s. 7), additional constables at the charge of individuals (s. 8), a statement of the numbers of the force being laid annually before Parliament (s. 9), their freedom from tolls (s. 10), the attendance of a sufficient number at the Police Courts and other criminal Courts to execute summonses and warrants (s. 11); all summonses and warrants issued within the district being executed by a constable of the force, and by none other (s. 12), the name of the constable to execute a warrant being indorsed by his superior officer (s. 13). Penalties or imprisonment are prescribed for neglect or violation of duty by constables (s. 14). They may not resign without leave or notice (s. 15), and must on ceasing to hold office deliver up clothing and accoutrements, or be liable to imprisonment (s. 16). Unlawful possession thereof or assumption of the dress or character of a constable by a person not a constable is made an offence (s. 17). Every person assaulting or resisting or aiding or inciting another to assault or resist a police officer in the execution of his duty, is made liable to a fine or imprisonment (s. 18); and certain special powers of arrest, entry, inspection, search, seizure, and detainer, and of regulating traffic, and taking bail, are given to the police (ss. 28, 33, 34, 35, 39, 46, 47, 48, 51, 52, 61, 62, 63, 64, 67, 68, 69, 70, 71, 72). The Act also creates various offences for which penalties and punishment are prescribed. One commissioner of police only and two assistant commissioners may now be appointed under the Police Acts (19 & 20 Vict. c. 2).

The Courts having been established with an efficient police force, an Act "for regulating" them was passed in the same session of Parliament (2 & 3 Vict. c. 71), and another Act "for better defining the powers of justices within the metropolitan police district" in the following year (3 & 4 Vict. c. 84).

Additional Courts have since from time to time been established by Orders in Privy Council under these Acts which, as amended and altered by subsequent legislation, still govern the Metropolitan Police Courts.

The special provisions applicable to those Courts and their present state may be thus summarised:—

2 & 3 Vict. c. 71 (The Met. Pol. Courts Act, 1839) provides for the continuance of the establishment (s. 1), and that the Crown, with the advice of the Privy Council, may alter the number of the Courts and magistrates, and by 3 & 4 Vict. c. 84 constitute Police Court Divisions and establish a Police Court for each, provided that there shall not at any time be more than twenty-seven magistrates (ss. 2, 4, 5).

There are now fourteen Courts and twenty-five magistrates, viz.: Bow Street, with the chief magistrate and two others; the Westminster, Marlborough Street, Marylebone, Clerkenwell, Lambeth, Worship Street, Thames, Southwark, and West London Courts, each with two magistrates; Greenwich and Woolwich, with two magistrates between them; and the North London and the South-Western Courts, each with one magistrate only, who is relieved by the assistance of magistrates from the other Courts when not on duty at their own.

The boundary of each district is defined in the Acts and in maps kept at the Courts (Archibald, *Met. Police Guide*, 1891, p. 71).

Vacancies are supplied by the Crown appointing barristers who have either practised as such during at least seven years then last past, or have practised as barristers for four years then last past, having previously practised as special pleaders for three years (2 & 3 Vict. c. 71, s. 3), or are stipendiary magistrates in the provinces (21 & 22 Vict. c. 73, s. 14). Clerks, ushers, doorkeepers, and messengers are appointed for the Courts, and



dismissed at pleasure by a Secretary of State (2 & 3 Vict. c. 71, s. 5). Salaries of the magistrates and receiver, prescribed by sec. 9, are, by 38 Vict. c. 3, fixed at £1800 for the chief magistrate, and at £1500 each for the other magistrates. These salaries are paid out of the Consolidated Fund; the expenses of and incidental to the Courts, except the salaries and superannuation allowances of the magistrates, are now paid out of the fund applicable for defraying the expenses of the metropolitan police (60 & 61 Vict. c. 26 s. 1).

The Courts are held on every day, except Sunday, Christmas Day, Good Friday, or any day appointed for a public fast or thanksgiving, and at such other times as urgent necessity may require or shall be directed by a Secretary of State (2 & 3 Vict. c. 71, s. 12), who may, by order, close the Courts on any day appointed under sec. 4 of the Bank Holidays Act, 1871, to be a Bank holiday (60 Vict. c. 14; Met. Pol. Act, 1897).

The time prescribed for the attendance of a magistrate is from 10 a.m. to 5 p.m. at each Court, except those of Greenwich and Woolwich, and from 10 a.m. to 1 p.m. at Greenwich, and from 2 p.m. to 5 p.m. at Woolwich (2 & 3 Vict. c. 71, s. 12).

**JURISDICTION.**—The magistrates have jurisdiction over the districts of each other (s. 13), and one magistrate may do any act directed to be done by more than one justice, but may not act at a special or petty sessions of all the justices acting in the division, or at Quarter Sessions (s. 14). Every summons or warrant issued by any justice of the home counties aforesaid other than a metropolitan police magistrate requiring any person residing within the metropolitan police district to appear at any place without the district to answer any information or complaint touching any matter arising within the district is void, except for enforcing payment of rates and taxes (s. 18), and except as to anything arising within a part of the district not assigned to any of the Police Courts (21 & 22 Vict. c. 73, s. 6); and no other justice nor his clerk may take any fees within the police district except at General or Quarter Sessions or Licensing Sessions or meetings of justices as to poor law settlements or removals, or in respect of business which must be transacted at such special or petty sessions or for enforcing rates and taxes (s. 42). The fees contained in a Schedule (A) to 2 & 3 Vict. c. 71 may be taken at the Police Court and may be enforced by distress (s. 43). Those fees are, for a summons, 2s.; warrant, 2s.; backing warrant, 1s.; recognisance to appear, 2s. 6d.; and to keep the peace, 2s.; supersedeas, 3s.; distress warrant, 3s.; declaration, except those relating to lost duplicates of articles under 20s., and except those made for the use of public offices or departments or for charitable purposes, 1s. (Sched. A). An account of all fees, penalties, and forfeitures must be kept, and delivered to the receiver, and the amount of all such sums paid to him to be applied towards the expenses of the Courts, except fines on drunken persons, constables for misconduct, or for assaults on police constables, which must be applied for the benefit of "The Police Superannuation Fund," and except fees for the execution of summonses and warrants (s. 46), even when by subsequent Acts such penalties or forfeitures are made payable to any body corporate or persons save the informer or any party aggrieved, except such as are sued for by direction of the Commissioners of Customs (s. 47). This section is not repealed by a later general Act providing that half of any penalty under it should be paid to the overseers (*Wray v. Ellis*, 1859, 1 El. & El. 276).

The Public Offices Fees Act, 1879, applies to all fees payable at the Metropolitan Police Courts (60 & 61 Vict. c. 26, s. 7).



The exclusive jurisdiction of metropolitan police magistrates is limited by 3 & 4 Vict. c. 84 to the seven Police Courts then already established; elsewhere in London two justices sitting together at petty sessions have the powers of one police magistrate, but at every Police Court at which the regular attendance of a police magistrate shall have been ordered, he, while present in such Court, shall act as the sole magistrate thereof (s. 6).

Penalties recovered before two justices so sitting together do not, however, go to the receiver as if they were one police magistrate under sec. 6 (*Receiver for Met. Pol. District v. Bell*, 1872, L. R. 7 Q. B. 433).

The distinction between the original and the later Police Courts as to exclusive jurisdiction is defined in the *Met. Police Guide*, p. 13.

Of the Metropolitan Police Courts the Bow Street Police Court alone has jurisdiction in extradition cases (33 & 34 Vict. c. 52, s. 26), but any metropolitan police magistrate or stipendiary magistrate may, by order of a Secretary of State, hear such cases when the removal of the accused to Bow Street would be prejudicial to his health (58 & 59 Vict. c. 33). See EXTRADITION, vol. v. p. 273.

The police magistrates must hold quarterly meetings to report and consider their proceedings (2 & 3 Vict. c. 71, s. 15). The Secretary of State may make rules for regulating the business of the Courts, a copy being laid before both Houses of Parliament (s. 16).

The precedent of appointing stipendiary magistrates in London was soon followed by an Act (2 & 3 Vict. c. 15) enabling one to be appointed for a particular group of populous towns in the country. He was to have the power of two justices, but might sit alone or with other justices; his jurisdiction was not exclusive, nor was he given any such special jurisdiction as that of the metropolitan magistrates. Fines and fees were to be paid over to a local treasurer in aid of a fund to be raised by a police rate, out of which the salaries of the establishment were to be paid. Public Acts (7 & 8 Vict. c. 30; 9 & 10 Vict. c. 65) of a like kind for two other provincial towns followed; in 1858 an Act gave to a stipendiary magistrate power to do alone all acts authorised to be done by two justices (21 & 22 Vict. c. 73); in 1863 an Act of general application (26 & 27 Vict. c. 97), enabling cities, towns, and boroughs of 25,000 inhabitants and upwards to obtain a stipendiary magistrate, was passed; and by 45 & 46 Vict. c. 50, the Municipal Corporations Act, 1882, s. 161, if the council of a borough desire a stipendiary magistrate for the borough, they may present a petition to the Secretary of State, and thereupon the Crown may appoint a barrister of seven years' standing (s. 2) to hold office during Her Majesty's pleasure (s. 3), at a yearly salary not exceeding, except with consent of the council of the borough, that mentioned in the petition, as Her Majesty shall direct (s. 5).

Under such local and general Acts stipendiary magistrates have been appointed and hold Courts at Birmingham, Bedford, Brighton, Cardiff, Chatham, Sheerness, Kingston-on-Hull, Leeds, Liverpool, Manchester City, Manchester Division, Merthyr Tydvil, Middlesborough, Pontypridd, Salford Borough, Sheffield, the Staffordshire Potteries, West Ham, and Wolverhampton. Stipendiary magistrates have jurisdiction as to the extradition of fugitive criminals for a crime on a vessel on the high seas which comes into a port of the United Kingdom (33 & 34 Vict. c. 52, s. 16).

The Metropolitan Police Acts perhaps suggested, or at least foreshadowed, some of the provisions in the Summary Jurisdiction Act, 1848 (11 & 12 Vict. cc. 42 and 43), regulating the procedure of justices at petty sessions, but are not affected thereby (11 & 12 Vict. c. 42, s. 29, and



c. 43, s. 33), although subject to the Summary Jurisdiction Acts, 1879 and 1884 (42 & 43 Vict. c. 49, s. 54; 47 & 48 Vict. c. 43).

The jurisdiction of police magistrates to investigate charges of indictable offences, and the procedure in such cases, are the same as those of other petty sessions, and governed by the Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 42). Such magistrates have also the jurisdiction of ordinary petty sessions in all cases which may be dealt with summarily.

Metropolitan police magistrates have, moreover, under the Metropolitan Police Court Acts and the numerous Acts and by-laws regulating London, jurisdiction over offences created by those Acts, and special powers, functions, and procedure in various cases—criminal, quasi-criminal, and civil.

POWERS.—The Police Act (2 & 3 Vict. c. 47) contains many provisions for the detection and suppression of crime, the maintenance of order, and the prevention of nuisances in the metropolis. The offences on the Thames of cutting the tackle of vessels with intent to steal (s. 27), letting fall articles from vessels into the river or boats to prevent seizure or discovery (s. 28), framing false bills of parcels (s. 29), possessing instruments for unlawfully carrying away liquors (s. 30), piercing casks and opening packages of liquors to steal them (s. 31), or to spill or drop the contents (s. 32), are made misdemeanours. Penalties are prescribed for having or firing loaded guns on vessels in the night (s. 36), and for heating combustible materials on vessels in the Thames between Westminster and Blackwall (s. 37); for keeping fairs open between certain hours (s. 38), for breaches of regulations as to refreshment houses (s. 44), cookshops, etc. (s. 45), for keeping unlicensed theatres (s. 46) or places for bear-baiting, or fighting cocks, dogs, etc. (s. 47), pawnbrokers receiving pledges from persons under sixteen (s. 50). Every person is, by sec. 54, made liable to a penalty of not more than forty shillings, who shall, in any thoroughfare or public place, commit any of the following offences, viz.—(1) show horses or caravans containing any show, or feed, farry, dress, or exercise any horse, or clean or repair carriages, except in cases of accident; (2) loose any horse or cattle, or any unmuzzled ferocious dog; (3) by negligence or ill-usage in driving cattle cause mischief; (4) having care of any cart or carriage ride on the shafts or horse without holding the reins, or be at such a distance as not to have control; (5) ride or drive furiously or to the common danger; (6) cause vehicles to stand longer than necessary for loading or unloading, or cause an obstruction; (7) ride or drive on the footway; (8) roll or carry any cask, etc., on any footway, except to load or unload carts, or cross it; (9) wilfully disregard traffic regulations; (10) without consent affix bills on buildings, etc., or deface or damage them or trees or seats in public places; (11) every prostitute loitering for the purpose of prostitution or solicitation to the annoyance of the inhabitants or passengers; (12) every person who shall sell or utter profanity, indecency, or obscenity to the annoyance of the inhabitants or passengers; (13) use threatening, abusive, or insulting words or behaviour whereby a breach of peace may be occasioned; (14) blow horns or use any other noisy instrument to call persons together, or announce any entertainment, or sell articles, or obtain money or alms; (15) wantonly discharge any firearm or missile to the damage or danger of any person, or make any bonfire, or set fire to any firework; (16) wilfully and wantonly disturb any inhabitant by ringing or knocking at any door without lawful excuse, or wilfully and unlawfully extinguish any lamp; (17) fly any kite or play at any game to the annoyance of inhabitants or passengers, or make or use any slide on ice or snow to the common danger.

The discharge of firearms of greater calibre than a common fowling-



piece within three hundred yards of any dwelling-house, to the annoyance of any inhabitant thereof, is prohibited in sec. 55, and carts drawn by dogs in sec. 56. By sec. 58 every person found drunk in any public thoroughfare and guilty of riotous or indecent behaviour, and also every person guilty of any violent or indecent behaviour in any police station house is liable to a penalty of not more than forty shillings, or may be committed for not more than seven days. Every person riding on a carriage without the consent of the owner or driver is liable to a penalty of five shillings, or, if a child under twelve years, may be detained and delivered to its parents (s. 59). A penalty of not more than forty shillings is imposed by sec. 60 on every person preparing cork, casks, timber, stone, or lime in a thoroughfare (1); laying coals and other materials in any thoroughfare except building materials placed or enclosed so as to prevent mischief to passengers (2); beating carpets or mats (except door-mats before 8 a.m.), or throwing dust or rubbish in any thoroughfare, or throwing any such thing into any sewer, pipe, well, watercourse, or reservoir (3); keeping swine near any street (5); exposing things for sale in any park or public garden without consent, or on or overhanging a carriage on footway or outside a shop, or setting up a projection from a building so as to cause annoyance or obstruction in any thoroughfare (7); and leaving cellars, areas, or pits adjoining any thoroughfare unfenced, uncovered, or unlighted (8).

Magistrates have jurisdiction as to fairs holden without lawful authority or beyond the lawful period (s. 39), and as to gaming houses (s. 48); and by 2 & 3 Vict. c. 71 may order that goods stolen or unlawfully obtained (s. 27), or unlawfully pawned (s. 28), be delivered up to the owner by brokers or dealers in second-hand property having possession of them, or, by 60 & 61 Vict. c. 30, when in the hands of the police. "Goods" in 2 & 3 Vict. c. 71, s. 27, may include money if the holder has been formerly charged with having fraudulently obtained it (*R. v. D'Eyncourt*, 1888, 21 Q. B. D. 109). The magistrate may also order goods not exceeding £15 in value, which are detained without just cause or subject to a lien, to be delivered to the owner, either absolutely or upon tender of the amount appearing to be due or upon performance of the act for which the goods are held as security (s. 40); and the word "goods" will include a dog (*R. v. Slade*, 1888, 21 Q. B. D. 433). Jurisdiction is given to settle disputes as to wages up to £5 for labour on the Thames, docks, and places adjacent (s. 37), to order compensation up to £15 for wilful or malicious damage by tenants (s. 38), to deal summarily with cases of oppressive distress up to the amount of £15 by ordering the distress, if not sold, to be returned to the tenant on payment of the rent due, or, if sold, to order payment of the value after deducting the rent (s. 39), and to order the cleansing, at the expense of the occupier, of houses certified by two guardians of the poor and the medical officer of the parish to be filthy (s. 41).

A metropolitan police magistrate has also power to—

(a) Remand any person for further examination, or suffer to go at large any person who shall be charged before him with any felony or misdemeanour upon his personal recognisance (with or without sureties) conditioned for his appearance before a magistrate or to take his trial, and the magistrate may from time to time enlarge such recognisance (2 & 3 Vict. c. 71, s. 36; 3 & 4 Vict. c. 84, s. 9);

(b) Mitigate penalties or terms of imprisonment, except under Revenue Acts (2 & 3 Vict. c. 71, s. 35), or the Militia Acts (45 & 46 Vict. c. 49, s. 42);



- (c) Lessen the share of informers (2 & 3 Vict. c. 71, s. 34);
- (d) Fine informers compounding informations for an offence by which they were not personally aggrieved (s. 33), or persons obtaining money or rewards by threatening informations or complaints for misdemeanours (3 & 4 Vict. c. 84, s. 11);
- (e) Award amounts up to £5 for frivolous charges (2 & 3 Vict. c. 71, s. 32);
- (f) Award costs to be paid to or by either of the parties to a charge or complaint (s. 31);
- (g) Issue search warrants for goods stolen or unlawfully obtained (s. 25).
- (h) Examine receivers, pretended purchasers, and persons having had or possessing such goods, and fine or imprison those guilty of unlawful possession of them (s. 26);
- (i) Fine to £5 or imprison for two months any person having or conveying in streets or public places anything which may be reasonably suspected of being stolen or unlawfully obtained, and who shall not give a satisfactory account how he came by the same (2 & 3 Vict. c. 47, s. 66; c. 71, s. 24; *Hadley v. Perks*, 1866, L. R. 1 Q. B. 444; 35 L. J. M. C. 277).

The magistrate may summarily convict any person charged with any offence against 2 & 3 Vict. c. 47, on the oath of one or more witnesses, or on his own confession (s. 76), and in every case of a penalty under the Act and non-payment, the offender may be committed to gaol for not more than one calendar month where the sum does not exceed £5, the imprisonment to cease on payment of the sum due (s. 77), and this applies even to the provision in 27 & 28 Vict. c. 55 as to street musicians, which repeals and is substituted for sec. 57 of the Police Act (*R. v. Hopkins*, [1893] 1 Q. B. 621).

For every misdemeanour or other offence against 2 & 3 Vict. c. 47, for which no special penalty is thereinbefore provided, the offender is liable at the discretion of the convicting magistrate either to a penalty not more than £5 or to be imprisoned for any time not more than one calendar month (s. 73).

PROCESS.—Persons are brought before the magistrate—(1) without process, (2) by process.

1. *Without Process*.—In addition to the general powers of arrest possessed by ordinary constables, a metropolitan police officer may, under the Metropolitan Police Acts, arrest “all loose, idle, and disorderly persons whom he shall find disturbing the public peace, or whom he shall have just cause to suspect of any evil designs” (10 Geo. IV. c. 44, s. 7), or of having committed or being about to commit any felony, misdemeanour, or breach of the peace, or whom he shall find between sunset and 8 a.m. lying or loitering in any highway, yard, or other place, and not giving a satisfactory account of themselves (2 & 3 Vict. c. 47, s. 64); persons suspected of felonies in ships and vessels in the Thames docks or creeks (s. 34); found committing any offence punishable either upon indictment or as a misdemeanour upon summary conviction, by virtue of this Act, or any person reasonably suspected of having or conveying in any manner anything stolen or unlawfully obtained (s. 66); found in a gaming house (s. 48); doing acts punishable under sec. 54 with a 40s. fine (various street nuisances) in his view (s. 54); by an offence forbidden in the Act, doing damage and not making amends on demand (s. 62); or any person offending against the Act within his view, and whose name and residence shall be unknown to the constable and cannot be ascertained by him (s. 63); or charged with an aggravated



assault when the constable has good reason to believe that such assault has been committed, although not within his view, and that by reason of the recent commission of the offence a warrant could not have been obtained (s. 65).

In some of the cases aforesaid the offender may be arrested by the owner of property on or with respect to which the offence shall be committed, or by his servant or any person authorised by him, and may be detained until he can be delivered into the custody of a constable (s. 66).

Every person taken into custody by any metropolitan police constable without warrant, except persons detained for the mere purpose of ascertaining their name or residence, must be forthwith delivered into custody at the nearest station house, to be brought before a magistrate, or to give bail to appear before him (s. 69).

2. *By Process*.—By summons in matters which may be determined summarily, and on non-appearance to the summons in criminal cases by warrant (2 & 3 Vict. c. 71, s. 19).

Such summons to be served on the party, or his wife, servant, or some adult inmate of his family at his usual place of abode (s. 20). Or the magistrate may, without issuing any summons, issue his warrant for the apprehension of any person charged with any offence cognisable before him whenever good grounds for so doing shall be stated on oath before him (s. 21). A warrant in respect of a matter arising within the metropolitan police district may be executed out of it, and does not require indorsement by another justice (s. 17). The attendance of witnesses may be enforced by summons, or in default of appearance, by warrant, and any person refusing to give evidence may be committed for fourteen days, or until submission to be examined (s. 22).

ROUTINE.—The staff of a metropolitan Police Court (s. 2) is composed of a chief clerk, second clerk, assistant clerk, usher, messenger, courtkeeper, doorkeeper, gaoler, assistant gaoler, and warrant officers. The buildings containing the court, offices, and cells are vested in the receiver. The courtkeeper has charge of them. The daily routine is that before 10 a.m., covered vans having compartments each capable of holding one prisoner, convey prisoners in custody from the gaols and police stations to the Court, where they are placed in cells, and their names and the particulars of the charges against them, contained in charge-sheets made out at the police stations, are entered in a register. The magistrate takes his seat in Court, and, before it is opened to the general public, persons wishing to make applications to him are admitted to do so. These applications are chiefly for a warrant or summons in respect of offences, but from the original institution of these Courts, it has been usual for the poor to ask and have advice of the magistrate in matters which, when stated, frequently prove to be beyond his jurisdiction. If he grants process, the applicant goes into an office, where particulars of the complaint are entered, and the fee is paid for the warrant or summons. The fee is often remitted to indigent persons. Applications by landlords of tenements, held at a rental not exceeding £20 a year, against tenants whose tenancy has been determined, and who have had notice to appear, and by licensed persons for temporary transfers of licences are next entertained.

The Court, attended by an inspector of police and several constables to keep order, is then opened to the general public, and the charges which have been entered in the magistrate's register are heard. The lighter charges of drunkenness and disorderly conduct, which involve the attend-



ance of many constables as witnesses who have been on night duty, are first disposed of. At most of the metropolitan Courts these charges are numerous, often exceeding fifty, and sometimes a hundred. If the offenders are not known to have been previously convicted, they are frequently discharged with a caution against repeating the offence. Charges of violent assault, for which the accused has been apprehended, come, as a rule, next in order, and then indictable crimes and misdemeanours. Cases arising on summons are generally heard in the afternoon, the defendants being summoned to attend at 2 p.m. The procedure in Court is mainly that prescribed by the Summary Jurisdiction Acts and general law, and used at all petty sessions.

Persons sentenced to imprisonment, committed for trial, or remanded in custody, are removed to the cells, and taken thence in the police vans to gaol.

There is an appeal from metropolitan police magistrates to Quarter Sessions in every case of summary orders or convictions in which the sum or penalty adjudged is more than £3, or the penalty or imprisonment more than one calendar month (2 & 3 Vict. c. 7, s. 50).

**Police, Metropolis.**—The common law system of police was superseded in 1829, for the METROPOLITAN POLICE DISTRICT, by 10 Geo. IV. c. 45, after previous experiments establishing a river police, a horse patrol, and the officers known as Bow Street runners, in addition to the watchmen maintained by the metropolitan parishes under Local Improvement Acts.

The nature of the system has been already dealt with under METROPOLITAN POLICE DISTRICT, and the many statutes affecting the area and its police are collected in Archibald's *Metropolitan Police Guide*, 2nd ed., 1896, and Chitty's *Statutes*, 6th ed., tit. "Police."

**Police, Parish.**—The Lighting and Watching Act, 1833 (3 & 4 Will. IV. c. 90), had empowered the parishes adopting it to employ constables and watchmen and to pay them out of a parish rate, and many local Acts existed with like objects. The County Police Act, 1839 (2 & 3 Vict. c. 93, s. 29), puts an end to the right to levy parochial police rates for any parish after the chief constable of the county has given notice that he is ready to undertake the policing of the parish, and the appliances and accoutrements provided by the parish pass to the county; but the parish may apply to the chief constable for additional police, and defray their cost out of a rate made under the Act of 1833, or the local Act. Provision is made for parishes and towns situate in more than one county.

Under the Parish Constables Act, 1842 (5 & 6 Vict. c. 109), justices or special sessions were empowered to appoint parish constables, who are entitled to act in the whole county, but not bound to act outside their parish. The Act was in 1844 (7 & 8 Vict. c. 52) extended to every liberty in England having a separate commission of the peace, and not being an incorporated borough.

Under the Parish Constables Act, 1892 (35 & 36 Vict. c. 92), appointment of parish constables was to be made only when Quarter Sessions resolved that it was necessary; and vestries, *i.e.* now councils of parishes not wholly or partly within a borough, are entitled to apply to justices for appointment of paid parish constables.



When the County Police Act, 1839 (2 & 3 Vict. c. 93, s. 25), came into force in any non-municipal portion of a county, all power to appoint and pay and make rates for paying constables in any hundred, township, parish, or place came to an end, except as to high constables (see CHIEF CONSTABLE), special constables under the Act of 1831 (see POLICE, COUNTY), and parochial constables; but the change did not prevent appointment of a constable to hold an election where necessary.

**Police Supervision.**—Under the Prevention of Crimes Act, 1871, a Court before whom any person is convicted of certain crimes after a PREVIOUS CONVICTION of any such crime may, by order, subject such person to police supervision for not over seven years after the expiration of the sentence imposed (34 & 35 Vict. c. 112, s. 7), and convicts at large on licence are likewise subject to such supervision. Persons subject to supervision have to report their residence to the chief officer of police in the district where it is, and to report change of residence (42 & 43 Vict. c. 55, s. 2; 54 & 55 Vict. c. 69, s. 4). This condition may be remitted (54 & 55 Vict. c. 69, s. 4 (2)), but breach of the Act, if not explained or excused, exposes the supervisee to twelve months' imprisonment on summary conviction, subject to his right to be informed of his power to elect to be tried by a jury.

**Policy of Insurance.**—See ACCIDENT INSURANCE; BURGLARY INSURANCE; FIRE INSURANCE; LIFE INSURANCE; MARINE INSURANCE.

**Political Offences.**—There has been considerable controversy as to the meaning of the term "political offence" from two points of view, municipal and international.

*Municipal.*—Where an offence has been committed, not from motives of private spite or interest, but in order to change the legislative or executive government in the country, it is frequently contended that the offence is political, and that persons convicted of it should not be treated as ordinary offenders, and should be pardoned or amnestied on the earliest opportunity. The offences to which this contention applies are those described as against public order, namely, treason, treason-felony, and sedition, or interference with the executive or Legislature by unlawful assemblies intended to defy or overawe either, or riotous protests against the law; and, in fact, all acts directed to obtain by unlawful means a change in the law or general government of the realm. There is no statutory recognition of any of these offences as political, unless it be sedition and seditious libel; as to which the law directs that persons convicted thereof shall be treated as first-class misdemeanants (40 & 41 Vict. c. 21, ss. 40, 41), and the controversy may be described as of a parliamentary rather than of a legal character.

*International.*—It is usual, if not invariable, to except from treaties of extradition "offences of a political character." What should be taken as excluded in this description has been much discussed by continental jurists (see 18 Clunet. 766). In England the subject seems to have been dealt with only by Sir James Stephen (*Hist. Crim. Law*, vol. ii. p. 70), and by the judges on applications for *habeas corpus* under the Extradition Act. The decisions are dealt with under EXTRADITION.



**Poll; Polling.**—See ELECTIONS.

**Polls, Challenge to the.**—See JURY.

**Polygamy.**—See MARRIAGE.

**Pond.**—A pond is a small area of land covered with water, usually brought there artificially, and usually having no stream running out of it. Many ponds have been formed for watering cattle, or storing fish with a view to consumption, or storing water for mills. They are not, as a general rule, subject to any public rights of fishing.

Damage to the dams, flood-gates, or sluices of a fish-pond, with intent to take fish, or poisoning the waters with like intent, or destroying the flood-gates or dam of a mill-pond, is punishable under 24 & 25 Vict. c. 97, s. 32; and minor damage to ponds appears to be covered by sec. 52 of the same Act.

**Pontage.**—See HIGHWAYS, vol. vi.; TRINODA NECESSITAS.

**Poor Kindred; Poor Relations.**—See WILL, *Judicial Glossary*.

**Poor Law Union.**—This phrase is defined by sec. 16 of the Interpretation Act, 1889 (52 & 53 Vict. c. 63), to mean “any parish or union of parishes for which there is a separate board of guardians.” See GUARDIANS OF THE POOR, vol. vi. pp. 114–123.

## Poor; Poor Law.

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The basis of the English poor law as at present administered is the celebrated 43 Eliz. c. 2, 1601. Before that Act the contributions for the relief of the poor were voluntary. Under the 27 Hen. VIII. c. 25, 1535, the scheme for the relief of the poor was by voluntary contributions, collected on Sundays by the churchwardens or two other persons in every parish. Next followed the 5 & 6 Edw. VI. c. 2, which made towards reducing the existing voluntary method of relieving the poor to a system, by directing the ministers and churchwardens of each parish to annually appoint two or more able persons to be gatherers and collectors of alms for the poor; and while the amount of each parishioner's contribution was generally left to himself to fix, in cases where this contribution was obviously inadequate to the means of the giver, the justices had power, on the complaint of the bishop of the diocese, to order the party in default to contribute such a sum as they considered reasonable. Subsequent legislation during the reign of Elizabeth provided for the appointment by the justices of four substantial householders, to be called overseers of the poor. It will be seen, therefore, that down to the year 1601 the relief of the poor was provided for by voluntary contributions, the collection of which had gradually become organised by legislation.

This state of things paved the way for the passing of the Poor Law Act, 1601 (43 Eliz. c. 2). It has been said that out of this statute more litigation, and a greater amount of revenue,<sup>1</sup> have arisen, with consequences more extensive and more serious in their aspect, than ever were identified with any other Act of Parliament or system of legislation whatever (Burn's *Justice of the Peace*, tit. "Poor").

Sec. 1 of this statute provided for the appointment by two justices of four, three, or two substantial householders for every parish, who, together with the churchwardens, were to be called the overseers of the poor, and, with the consent of two or more justices, were directed "to raise, weekly or otherwise, by taxation of every inhabitant, parson, vicar, and other, and of every occupier of lands, houses, tithes impropriate or propriations of tithes, coal-mines, or saleable underwoods in the said parish, in such competent sum and sums of money as they shall think fit, a convenient stock of flax, hemp, wool, thread, iron, and other necessary ware and stuff to set the poor to work on; and also competent sums of money for and towards the relief of the lame, impotent, old, blind, and such other among them, being poor and not able to work.

The same section also provided for the apprenticing of pauper children, and directed the churchwardens and overseers to meet at least once a month, on Sunday afternoon, "to consider of some good course to be taken, and of some meet order to be set down in the premises"; they were also ordered to render accounts and hand over any balance in their hands to their successors. A penalty of twenty shillings was imposed for absence or negligence on the part of the churchwardens or overseers. Here,

<sup>1</sup> For the financial year ending in 1894, the amount spent on the relief of the poor in England and Wales was £7,228,679 (Twenty-sixth Annual Report of the Local Government Board, 1897, p. clxxxviii).



therefore, is the statute under which the overseers of the poor are still appointed, and the authority for the poor rate.

Sec. 2 enabled the justices, if they perceived that the inhabitants of any parishes were unable "to levy among themselves sufficient sums of money for the purposes aforesaid," to rate any other parishes in the same hundred, or if the hundred was not able, then the justices at Quarter Sessions might rate any parishes in the county. The overseers were given power by sec. 4, with the consent of the lord of the manor, to build houses upon the waste land of the parish for the impotent poor. Sec. 6 enacted that "the father and grandfather, and the mother and grandmother, and the children, of every poor, old, blind, lame, and impotent person, or other poor person not able to work, being of sufficient ability, shall, at their own charges, relieve and maintain every such poor person," which is still the law. By the 7 Jac. I. c. 4, a remedy was provided in cases where persons ran away and left their families chargeable to the parish, such persons being deemed incorrigible rogues. This statute has since been repealed, but its place has been taken by the 5 Geo. IV. c. 83, 1824, which is to the same effect.

In order to protect the ratepayers of individual parishes against the burden of having to support paupers who might come from other parishes and endeavour to settle themselves, the 13 & 14 Car. II. c. 12, 1662, was passed, which, after reciting that—

by reason of some defects in the law poore people are not restrained from going from one parish to another, and therefore doe endeavour to settle themselves in those parishes where there is the best stocke, the largest commons or wastes to build cottages, and the most woods for them to burn and destroy, and when they have consumed it, then to another parish, and att last become rogues and vagabonds, to the great discouragement of parishes to provide stocks where it is lyable to be devoured by strangers,

enabled two justices, on complaint of the churchwardens or overseers of the poor of a parish, to remove by warrant any person coming to inhabit in the parish in any tenement under the yearly value of ten pounds, and likely to become chargeable to that parish; the complaint was required to be made within forty days after such person came so to settle, and the removal was directed to be made to such parish where the person was "last legally settled, either as a native, householder, sojourner, apprentice, or servant, for the space of forty days at least, unless he or they give sufficient security for the discharge of the said parish, to be allowed by the said justices." In this way the law of settlement arose, with its numerous complications and modifications engrafted by subsequent legislation on this its original trunk (Burn's *Justice*, tit. "Poor"). Since, however, the foregoing remarks appeared in Burn's *Justice*, the 39 & 40 Vict. c. 61, 1876, has been passed, sec. 35 of which abolished derivative settlements, subject to certain exceptions in the case of married women and legitimate children.

In 1783 was passed the 22 Geo. III. c. 83, generally known as "Gilbert's Act." The object of this enactment was to abolish the system of farming the poor that had been introduced by the 9 Geo. I. c. 7, and other abuses which had grown up under the laws relating to the poor. The Act was adoptive, and provided for the appointment of guardians of the poor, and the provision of workhouses, with power for two or more parishes to unite for the purposes of it. The first workhouse in England, however, seems to have been built at Bristol in 1697, under a special Act. But "Gilbert's Act" did not accomplish its main object, which was to put an end to the evils which had grown up by a lax administration of out-door relief under



statutes passed subsequently to the Act of Elizabeth. So great had these become, that in 1832 a commission was issued "to make diligent and full inquiry into the practical operation of the laws for the relief of the poor in England and Wales, and into the manner in which these laws were administered, and to report their opinion as to what beneficial alterations could be made." The result of this inquiry was laid before Parliament in 1834, and the Commissioners reported:

That the fund which the 43rd of Elizabeth directed to be employed in setting to work children and persons capable of labour, but using no daily trade, and in the necessary relief of the impotent, had been applied to purposes opposed to the letter, and still more to the spirit of the law, and destructive to the morals of the most numerous class and to the welfare of all. That the great source of abuse was the out-door relief afforded to the able-bodied, on their account or on that of their families, given either in kind or in money.

This report led to the passing of the Poor Law Amendment Act, 1834 (4 & 5 Will. IV. c. 76). The Act was based on the principle that no one should be suffered to perish through the want of what is necessary for sustaining life; but at the same time that, if he be supported at the expense of the public, he must be content to receive such support on the terms most consistent with the public welfare; and the objects of the Act were—

first, to raise the labouring classes—that is to say, the bulk of the community—from the idleness, improvidence, and degradation into which the mal-administration of the laws for their relief has thrown them; and, secondly, to immediately arrest the progress, and ultimately diminish the amount, of the pressure on the owners of lands and houses (Sir George Nicholl's *History of Poor Law*, vol. ii. p. 286).

The provisions of the 4 & 5 Will. IV. c. 76 may be briefly stated to be as follows: The Crown was empowered to appoint three commissioners to sit as a board to carry the Act into execution. The administration of relief to the poor throughout England and Wales, according to the existing laws, was made subject to the control of the commissioners, who were authorised to issue rules, orders, and regulations for the management of the poor, for the government of workhouses, and the education of children therein, and for the apprenticing of poor children, and for the guidance and control of all guardians, vestries, and parish officers, so far as related to the management of the poor, and the keeping, examining, auditing, and allowing or disallowing of accounts, and making or entering into contracts, or any expenditure for the relief of the poor, and for carrying the Act into execution in all other respects as they should think proper; but they were not enabled to interfere in any individual case for the purpose of ordering relief. All the powers of "Gilbert's Act" and all other Acts relating to the providing of workhouses, the borrowing of money, and governing and employing the poor, were subjected to the control of the commissioners. The commissioners were empowered to form poor law unions by uniting parishes for the administration of the poor laws. Power was also given to the commissioners, with the consent of the guardians or ratepayers, to build and enlarge workhouses. The appointment, duties, and salaries of paid officers for administering relief were placed under them. Provision was made for the affiliation of bastard children, and certain kinds of settlement were abolished. The removal of paupers to their place of settlement was regulated. By the 10 & 11 Vict. c. 109, the Poor Law Board was constituted, and the powers of the commissioners transferred to it. In the same year was issued the General



Consolidated Order (24th July 1847), which forms the foundation of that part of the poor law which rests upon orders. The present Local Government Board was established by the 34 & 35 Vict. c. 70, 1871, and is the successor of the Poor Law Board.

#### AUTHORITIES AND OFFICERS FOR THE ADMINISTRATION OF THE POOR LAW.

*Local Government Board.*—The whole management of, and administration of relief to, the poor throughout England and Wales is subject to the direction and control of the Local Government Board (4 & 5 Will. IV. c. 76; 34 & 35 Vict. c. 70). The Board, however, cannot interfere with the law of settlement and removal (*ibid.*). The Local Government Board have power to issue rules, orders, and regulations for the management of the poor generally, and from time to time to modify and alter such rules, orders, and regulations. A written or printed copy of every rule, order, or regulation of the Local Government Board must, before it comes into operation in any parish or union, be sent to the overseers of such parish, the guardians of such union or their clerk, and to the clerk of the justices of the petty sessions held for the division in which such parish or union is situate; and the overseers and guardians are required to notify and give publicity to the same and preserve them and allow them to be inspected and copied by owners of property and ratepayers. Similar provisions apply to the disallowance or revocation of rules (4 & 5 Will. IV. c. 76, s. 18). The Board are required to cause a copy of every general rule, order, or regulation issued by them to be laid before both Houses of Parliament as soon as practicable after its publication. General orders must be published in the *London Gazette*, and when so published, no further publication is necessary (35 & 36 Vict. c. 79, s. 48; 38 & 39 Vict. c. 55, Sched. V. Pt. 111). By the 4 & 5 Will. IV. c. 76, s. 98, persons wilfully disobeying the rules, orders, and regulations of the Local Government Board may be punished. A rule, regulation, or order is valid if made under the seal of the Board, and signed by the president and countersigned by the secretary or assistant secretary, and the production of a rule, order, or regulation so signed and sealed is, until the contrary is shown, sufficient proof that it was duly made (34 & 35 Vict. c. 70). Any rule, order, or regulation made by the Local Government Board may be removed into the Queen's Bench Division of the High Court by *certiorari* (*ibid.* ss. 105–108). Any written document signed or purporting to be signed by a secretary or assistant secretary of the Local Government Board, is *prima facie* evidence of the decision of the Board (29 & 30 Vict. c. 113, s. 4). By the 4 & 5 Will. IV. c. 76, s. 26, the Local Government Board have power to form unions of parishes for poor-law purposes, and may dissolve or alter unions (39 & 40 Vict. c. 61, s. 11) and change the name of a union (*ibid.* s. 13). The 29 & 30 Vict. c. 113, s. 18, enacts that in all statutes, except where there is something in the context inconsistent therewith, the word "parish" shall, among other meanings applicable to it, signify a place for which a separate poor rate is or can be made, or for which a separate overseer is or can be appointed. The Local Government Board has power to order workhouses to be built, enlarged, or repaired (4 & 5 Will. IV. c. 76, ss. 23, 25). By the 10 & 11 Vict. c. 109, s. 11, power is given to the Board to require the attendance of persons upon any matter connected with the execution of any of the powers vested in them, and may hold inquiries and require returns to be made to them. But no person can be required to go more than ten miles from his place of abode to attend an inquiry. Witnesses may be put on oath at these inquiries. The Board have



also power, with the consent of the Treasury, to appoint inspectors for the purpose of conducting special inquiries, and may delegate to persons so appointed all such powers of the Board, as the Board may think necessary, for summoning witnesses and conducting such inquiry (*ibid.* s. 22). By sec. 13 of the last-mentioned statute, the Local Government Board shall once in every year submit to Her Majesty a general report of their proceedings, and every such report shall be laid before both Houses of Parliament within six weeks after the date thereof if Parliament be sitting, and if not sitting within six weeks after the next meeting of Parliament.

*Poor Law Inspectors.*—Poor law inspectors are appointed and paid by the Local Government Board (10 & 11 Vict. c. 109, s. 20; 34 & 35 Vict. c. 70). They are entitled to visit and inspect every workhouse or place wherein any poor person in receipt of relief shall be lodged, and to attend every board of guardians and every parochial and other local meeting held for the relief of the poor, and to take part in the proceedings, but not to vote at such board or meeting (10 & 11 Vict. c. 109, s. 20). The inspectors may summon before them such persons as they may think necessary, for the purpose of being examined before them upon any matter concerning the administration of the laws relating to the relief of the poor, or any other matter placed by law under the control or regulation of the Commissioners, or for the purpose of producing and verifying upon oath any book, contracts, agreements, accounts, writing, or copies of the same, in anywise relating to such matter, and not relating to or involving any question of title to any lands, tenements, or hereditaments not being the property of any parish or union, and may examine any person whom they shall so summon, or who shall voluntarily come before them to be examined upon any such matter upon oath, which each of the said inspectors shall be empowered to administer, or instead of administering an oath, the inspector may require the party examined to make and subscribe a declaration of the truth of the matter respecting which he shall have been or shall be so examined; and all summonses made by any such inspector for any such purpose as aforesaid shall be obeyed by all persons as if such summons had been the summons and order of the Commissioners, and the non-observance thereof shall be punishable in like manner; and the costs and expenses of such person so summoned shall be paid in such cases in such manner as the costs and expenses of persons summoned under the authority of the first-recited Act are now payable; provided always that no person shall be required in obedience to any such summons to go or travel more than ten miles from his place of abode.

*District Auditors.*—District auditors are appointed by the Local Government Board under the 42 Vict. c. 6. The Board have power from time to time to appoint such number of district auditors as they may, with the sanction of the Treasury, think fit for the performance of the duties of auditing the accounts which are for the time being by law subject to be audited by district auditors, and may from time to time remove such auditors. The same statute gives the Local Government Board power to assign districts for which auditors are to act and to vary them from time to time. Assistant auditors may also be appointed. Auditors are paid out of moneys provided by Parliament, but a board of guardians is bound to prepare and submit to the auditor at every audit a financial statement in duplicate in the form prescribed by the Local Government Board, one of which duplicates has to be stamped according to the amount of the expenditure. The auditor is required to cancel the stamp by writing across



it the amount of the expenditure audited and allowed, and to forward the duplicate statement so stamped to the Local Government Board (*ibid.* s. 3).

| Where the total of the expenditure comprised<br>in the financial statement is | The sum shall be |
|-------------------------------------------------------------------------------|------------------|
| Under £20 . . . . .                                                           | 5s.              |
| £20, and under £50 . . . . .                                                  | 10s.             |
| £50, and under £100 . . . . .                                                 | £1               |
| £100, and under £500 . . . . .                                                | £2               |
| £500, and under £1,000 . . . . .                                              | £3               |
| £1,000, and under £2,500 . . . . .                                            | £4               |
| £2,500, and under £5,000 . . . . .                                            | £5               |
| £5,000, and under £10,000 . . . . .                                           | £10              |
| £10,000, and under £20,000 . . . . .                                          | £15              |
| £20,000, and under £50,000 . . . . .                                          | £20              |
| £50,000, and under £100,000 . . . . .                                         | £30              |
| £100,000, and upwards . . . . .                                               | £50              |

(*Ibid.* Sched. I.) It is the duty of the district auditor to audit the accounts of the guardians of the poor of the several unions within his district and those of their officers, also the accounts of the overseers of the poor of the parishes comprised in the several unions. The accounts of the overseers are exempt from stamp duty (42 Vict. c. 6, s. 8). The Local Government Board may authorise any person selected by the auditor to act temporarily as his deputy (11 & 12 Vict. c. 91, s. 10). The auditor is required to give or send by post to the overseers fourteen days' notice of the audit. He must also give the clerk of the guardians fourteen days' notice in writing of the time and place he intends to commence the audit of the accounts of the union, and of the parishes therein. This notice must also be advertised in some newspaper circulating in the county (*ibid.* s. 11), and seven clear days at least (in reckoning the "seven clear days at least" the time must be reckoned excluding both the day of the act and that of the event, *R. v. Shropshire JJ.*, 1838, 8 Ad. & E. 173) before the day fixed for the audit of accounts, the overseers or other officers employed in any parish in carrying the laws for the relief of the poor into execution shall cause their rate books and other books of account to be made up and balanced (to the 25th March and 29th September in each year), and the books so made up shall forthwith be deposited at the place appointed, and any owner of property or ratepayer having an interest in the said accounts is entitled to inspect, examine, and copy the same after the accounts have been so deposited. As soon as the owners receive notice from the auditor of the day appointed by him for auditing the accounts, they must cause the notice to be affixed on the places where parochial notices are usually fixed (7 & 8 Vict. c. 101, s. 33). By the same section every ratepayer in any parish or union is entitled to be present at the audit of the accounts of the parish or union, and to make any objection to such accounts before the auditor. By Art. 32 of the General Order for accounts of 14th January 1867, the clerk of the guardians shall, three clear days before the day appointed for auditing the union accounts, deposit the half-yearly statement of the accounts of the union, together with the relief order book and ledger, in the board room, and permit them to be inspected, examined, and copied by any ratepayer or owner of property in the union. Every auditor appointed for a district has full powers to examine, audit, allow, or disallow of accounts, and items



therein relating to moneys assessed for and applicable to the relief of the poor of all the parishes and unions within his district, and to all other money applicable to such relief, and he is bound to charge in every account audited by him the amount of any deficiency or loss incurred by the negligence or misconduct of any person accounting, or of any sum for which any such person is accountable, but not brought by him into account against such person, and shall certify on the face of every account audited by him any money, books, deeds, papers, goods, or chattels found by him to be due from such person (7 & 8 Vict. c. 101, s. 32). By Art. 38 of the General Order for accounts, dated 14th January 1867, the auditor is required to audit the accounts of the union and the parishes comprised in it once in every half-year; that is to say, as soon as may be after 25th March and 29th September respectively. If any bill due to a solicitor be not taxed before it is presented to the auditor, the auditor may tax it, and his decision on the reasonableness as well as the legality of the charges is final (7 & 8 Vict. c. 101, s. 39). If the auditor sees fit to surcharge any person not present at the audit, he should adjourn so much of the audit as relates to that particular matter, and communicate with the party (11 & 12 Vict. c. 91, s. 8). A person from whom any money is certified to be due by the auditors must pay over the same within seven days to the treasurer of the union (7 & 8 Vict. c. 101, s. 32), and if he fails in doing so the payment may be enforced in the same way as if it were due in respect of a poor rate (47 & 48 Vict. c. 43, s. 11). Any person aggrieved by any allowance, disallowance, or surcharge may apply to the Queen's Bench Division for a writ of *certiorari* to remove it into the High Court (7 & 8 Vict. c. 101, s. 35). But an appeal also lies to the Local Government Board, who have power to decide on the lawfulness of any allowance, disallowance, or surcharge made by an auditor (*ibid.* s. 36). And by the 11 & 12 Vict. c. 91, s. 4, the Board has also power to decide an appeal to them on the merits; and although the allowance, disallowance, or surcharge may have been lawfully made by the auditor, to remit the disallowance or surcharge if it appears to them that it was incurred under such circumstances as make it fair and equitable that it should be remitted. An appeal to the Local Government Board may be made by letter stating clearly all the facts of the case and the reasons given by the auditor. The Board has prescribed a form for making an appeal to them from the decision of an auditor.

*Guardians of the Poor.*—The guardians govern the workhouse and administer the relief of the poor, and their duties in these respects are prescribed by the Local Government Board, but they cannot act except at a meeting of the board of guardians (4 & 5 Will. IV. c. 76, s. 38). The only acts which guardians can do, without the consent, or being subject to the control of the Local Government Board, are the refusing of relief in any individual case, and the accepting, taking, and holding real or personal property for the benefit of their union, and the bringing of actions or preferring indictments in respect of such property, or on any contracts or securities given to them in virtue of their office (5 & 6 Will. IV. c. 69, s. 7). With the consent of the Local Government Board, guardians may subscribe to public hospitals and infirmaries, to institutions for blind or deaf and dumb persons, to associations for providing nurses, or for aiding boys or girls in service, or any other similar institutions or asylums (14 & 15 Vict. c. 105, s. 4; 42 & 43 Vict. c. 54, s. 10). Where the consent in writing of the majority of the guardians is required, it is a sufficient compliance with such requirement if a resolution giving consent is passed at a meeting of the guardians, of which, and the business to be transacted thereat, not less



than fourteen days' notice shall have been given to each guardian (45 & 46 Vict. c. 58, s. 12). The consent of the guardians of a union is necessary before the Local Government Board can order a workhouse to be built and, in some cases, enlarged (4 & 5 Will. IV. c. 76, ss. 23, 25; 29 & 30 Vict. c. 113, s. 8).

Mortgages and bonds given in pursuance of the rules, etc., of the Local Government Board, and contracts or agreements, or the appointment of any officer, are not liable to stamp duty (4 & 5 Will. IV. c. 76, s. 86). The guardians of any union or parish may pay the reasonable expenses incurred in the preparation or collection of information required of or by them respecting any matter which is under their management, supervision, or control, and if any such information is required from their officers the amount payable may, if there be any disagreement on the subject, be settled by the Local Government Board (39 & 40 Vict. c. 61, ss. 15, 16).

Meetings of guardians may be held in private, and when the conduct or character of any official or particular person is under discussion it is the proper course that the meeting should be private (*Purcell v. Sowler*, 1877, 2 C. P. D. 215; 41 J. P. 789; *Pittard v. Oliver*, 1891, 55 J. P. 100). In *Pittard v. Oliver* the defendant, a member of the board, made use at a board meeting of certain slanderous words affecting the conduct and character of the plaintiff, who was an official of the board, but this the defendant did *bona fide*, and without malice. The occasion was held to be privileged, and therefore he was held not liable. The meeting was held in public, and several reporters were present, but this did not destroy the privilege. But it would probably have been otherwise if the presence of the reporters and the public was due to the action of the defendant.

The district auditor has no right to be present at a meeting of the board; the inspectors of the Local Government Board, on the other hand, are entitled to attend every meeting of a board of guardians, but not to vote at such meetings (10 & 11 Vict. c. 109, s. 20). Meetings of guardians are regulated by the rules in Sched. I. to the Public Health Act, 1875 (56 & 57 Vict. c. 73, s. 59). As to the removal of a disorderly member or stranger, reference may be made to *Doyle v. Falconer*, 1866, L. R. 1 P. C. 328; *Dobson v. Fussey*, 1831, 7 Bing. 305. Guardians are not entitled to charge the rates with the cost of refreshments at their meetings, nor for loss of time or the cost of conveyance to attend meetings of the board (11 Off. Cir. 80). Guardians may appoint a committee to consider and report on any special subject, but no act or decision of such committee shall be deemed to be the act of the guardians (art. 40, General Order, 24th July 1847). Guardians have no authority, however, to divide themselves into committees for the purposes of hearing and deciding applications for relief unless specially authorised to do so by the Local Government Board; nor can they delegate to a committee the opening of tenders for supplies. Guardians may not hold their meetings at different places throughout the union, but they might resolve themselves into a committee for the purpose of inquiring into and reporting to the board upon the cases of out-door paupers in any particular parish or parishes of the union (9 Off. Cir. 118).

The 55 Geo. III. c. 137, and 4 & 5 Will. IV. c. 77, ss. 51, 77, impose heavy penalties on persons having the management of the poor, if concerned in contracts for the supply of goods for the use of such poor. By the 22 & 23 Vict. c. 49, s. 1, guardians are required to discharge all their debts within the half-year in which they are incurred, or within three months after the expiration of the half-year, but not afterwards. Should they omit to do so, they can apply to the Local Government Board, who may extend the time



if they think fit. Contracts, to bind guardians, ought to be under their seal, and should relate to some matter incident to the purposes for which they were incorporated. Guardians must pay every sum greater than £5 by order. This order is drawn upon the treasurer of the union, and must be signed by the presiding chairman and two other guardians at a meeting, and countersigned by the clerk (General Order, 24th July 1847, art. 84). Cheques must be payable "to order," and in the form prescribed by the General Order, 7th April 1857. Cheques so drawn are exempt from stamp duty. A guardian signing a cheque drawn for an illegal purpose is liable to be surcharged by the auditor with the amount. Guardians are required to examine every bill exceeding £1 in amount presented to them for payment (*ibid.* art. 85). Subject to the approval of the Local Government Board, every board of guardians shall pay the costs of legal proceedings taken by the auditor. Guardians may also pay the expenses of deputations and of their representatives to a Poor Law Conference. The 7 & 8 Vict. c. 101, s. 31, enables guardians to bury the body of any poor person which may be within their parish or union, if they think fit. Guardians acting in execution of their duties are protected by the Public Authorities Protection Act, 1893. See also tit. GUARDIANS OF THE POOR.

*Overseers of the Poor.*—Overseers may give temporary relief out of the poor rate in kind but not in money, in cases of sudden and urgent necessity, and not otherwise (4 & 5 Will. IV. c. 76, s. 54). When application is made to the overseers for relief by a vagrant or a person usually in the parish, and the case is not urgent in its nature, they should refer the applicant to the relieving officer of the district. If an overseer is ordered by a justice to give relief, he is bound to obey the order under a penalty of £5 (*ibid.*). Overseers and assistant overseers may, in all cases of sudden and urgent necessity, give a written order to admit a pauper into the union workhouse. Where temporary relief is given under the above-mentioned circumstances, the overseer must forthwith report the case in writing to the relieving officer of the district, or to the board of guardians, and the amount of such relief, or the fact of having given such an order, as the case may be (Consolidated Order, 24th July 1847). The same Order also provides that if an overseer receives an order for medical relief from any justice he must, as soon as may be after complying with such order, report the fact to the relieving officer or the board of guardians. And if an overseer receives an order under the hands and seals of two justices, directing relief to be given to any aged and infirm person, without such person being required to go into the workhouse, he must forthwith transmit the same to the relieving officer of the district, to be laid before the guardians at their next meeting. Overseers should charge the value of the relief in kind they give in their accounts, and its legality will be for the auditor to decide upon at his audit. See also tit. OVERSEERS.

*Paid Officers of Guardians.*—The guardians shall, whenever it may be requisite, or whenever a vacancy may occur, appoint fit persons to hold the under-mentioned offices, and to perform the duties respectively assigned to them:—(1) Clerk to the guardians; (2) treasurer of union; (3) chaplain; (4) medical officer for the workhouse; (5) district medical officer; (6) master of the workhouse; (7) matron of the workhouse; (8) schoolmaster; (9) schoolmistress; (10) porter; (11) nurse; (12) relieving officer; (13) superintendent of out-door labour; and also such assistants as the guardians, with the consent of the Local Government Board, may deem necessary for



the efficient performance of the duties of any of the said offices (General Consolidated Order, 24th July 1847, art. 153). The guardians may also employ subordinate officers and servants in connection with the relief of the indoor poor (Order, 19th August 1867). The guardians may appoint collectors of rates and vaccination officers. The ordinary and convenient practice is that the master and matron of a workhouse should be husband and wife. The officers so appointed to or holding any of the above offices, as well as all persons temporarily discharging the duties of such offices, shall respectively perform such duties as may be required of them by the rules and regulations of the Local Government Board in force at the time, together with such other duties, conformable with the nature of their respective offices, as the guardians may lawfully require them to perform (Order, 24th July 1847, art. 154). No person is eligible to hold any parish office, or have the management of the poor in any way whatever, who shall have been convicted of felony, fraud, or perjury (4 & 5 Will. IV. c. 76, s. 48). Every officer and assistant, to be appointed under this Order, shall be appointed by a majority of the guardians present at a meeting of the board, consisting of more than three guardians, or by three guardians if no more than three be present. Every such appointment shall, as soon as the same has been made, be reported to the Local Government Board by the clerk (Order, 24th July 1847, art. 155). It was held in *Austin v. Bethnal Green*, 1874, L. R. 9 C. P. 91; 38 J. P. 248, that guardians cannot be sued on a contract of hiring not under seal. The guardians may from time to time, with the consent of the Local Government Board, divide the union into districts for general and medical relief (*ibid.* art. 157). Arts. 162–167 of the General Order, 24th July 1847, specify certain qualifications required of the above-mentioned officers, with the exception of the medical officer. His qualifications are laid down in an Order dated 10th December 1859. The guardians are required to pay to the several officers appointed by them such salaries or remuneration as the Local Government Board from time to time direct or approve; and they may, with the consent of the Board, pay for extraordinary services (Order, 24th July 1847, art. 172). Every treasurer, master of a workhouse (or matron where there is no master), collector, or relieving officer, every person hereafter appointed as clerk, and every other officer whom the guardians shall require to do so, shall respectively give a bond to the guardians conditioned for the good and faithful performance of the duties of the office, with two sufficient sureties, not being officers of the same union (*ibid.* art. 184). In lieu of a bond, the guardians may accept as security for any officer the guarantee of any company which shall have complied with the conditions contained in The Guarantee by Companies Act, 1867. With the consent of the Local Government Board, the guardians may dispense with security from their treasurer when he is a banker or a partner in a banking firm (Order, 24th July 1847, art. 186). Guardians are required to provide for the safe custody of bonds given to them, and to cause them to be produced to the auditor (*ibid.* arts. 86, 87).

Collectors and assistant overseers, whether appointed by the guardians, or under the 59 Geo. III. c. 12, s. 7, and by the 7 & 8 Vict. c. 101, s. 61, are bound to give security to the board of guardians.

Every officer appointed to or holding any office under the Order of 24th July 1847, other than the medical officer, shall continue to hold the same until he die or resign, or be removed by the Local Government Board, or be proved to be insane, to the satisfaction of the Local Government Board (art. 187). A workhouse porter, nurse, assistant, or servant may be



dismissed by the guardians without the consent of the Local Government Board, but every such dismissal and the grounds therefor must be reported to the Board (*ibid.* art. 188). The guardians have power to suspend any master, matron, schoolmaster, schoolmistress, medical officer, relieving officer, or superintendent of out-door labour, and must forthwith report such suspension, together with the cause, to the Local Government Board (Order, 24th July 1847, art. 192). The Local Government Board may remove any officer of a workhouse (12 Vict. c. 13, s. 5). The guardians have no power to suspend or dismiss their clerk, treasurer, or chaplain.

If they have any reason to complain of any one of these officers, they should report the case to the Local Government Board.

The Poor Law Officers Superannuation Act, 1896 (59 & 60 Vict. c. 50), provides for superannuation allowances to poor law officers. A scale of contributions by the officers from their salaries is prescribed by the Act, which are obligatory on all officers appointed after it came into force. Existing officers and servants had power to exclude themselves from its operation. Compensation may be given to officers deprived of their office by the dissolution of a union (30 & 31 Vict. c. 106, s. 20 ; *R. v. Poor Law Board*, 1871, L. R. 6 Q. B. 785), or by reason of a parish having been united to another parish to form a union (33 & 34 Vict. c. 2, s. 10). And further, if any officer suffers any direct pecuniary loss by abolition of office, or by diminution or loss of fees or salary in consequence of anything done under the Local Government Act, 1894, he is entitled to compensation (s. 81 (7)).

*Justices of the Peace.*—Before the passing of the Local Government Act, 1894, justices of the peace were *ex officio* guardians of the poor for the unions in which they resided, but this is no longer so (56 & 57 Vict. c. 73, s. 20 (1)). In certain cases, however, justices may grant relief. Any two justices, usually acting for the district in which the union is situated, may, in their discretion, by order under their hands and seals, direct that relief shall be given to any adult person who shall from old age or infirmity be wholly unable to work, without requiring that such person shall go into the workhouse (4 & 5 Will. IV. c. 76, s. 27). And justices may order overseers to grant relief in cases of urgent necessity (*ibid.* s. 54). Justices have also authority in removals (see p. 210, *post*). Any justice of the peace may at all times in the day-time visit the workhouse of the union or parish in which he resides, and examine into the state and condition of the poor therein, and their food, clothing, and bedding, and the condition of the house, with power to summon the master, if there is cause of complaint, to appear before the justices at Quarter Sessions to answer such complaint.

In cases requiring an immediate remedy, two justices may make an order. Such an order will hold good until the next Quarter Sessions (30 Geo. III. c. 49, ss. 1 and 2). In parishes not within the operation of secs. 5 (1), 33 (1) of the Local Government Act, 1894, justices appoint the overseers and assistant overseers (43 Eliz. c. 2, s. 1 ; 14 Car. II. c. 12, s. 21 ; 12 & 13 Vict. c. 8, s. 1 ; 59 Geo. III. c. 12, ss. 7, 35). Poor rates to be valid must be allowed by two justices of the peace (43 Eliz. c. 2, s. 1 ; 12 & 13 Vict. c. 64).

*District Boards for Schools.*—The Local Government Board have power to combine unions, or parishes not in union, or such parishes and unions, into school districts for the management of any class or classes of infant poor not above the age of sixteen, being chargeable to any such union or parish, who are orphans, or are deserted by their parents, or whose parent or surviving parent or guardians are consenting to the placing of such



children in the school of the district (7 & 8 Vict. c. 101, s. 4; and see 11 & 12 Vict. c. 82, s. 1, and 30 & 31 Vict. c. 106, s. 16). By sec. 42 of the 7 & 8 Vict. c. 101 a board is to be constituted for every district so formed, to consist of members to be elected from amongst the persons rated in the district to the relief of the poor by the guardians of such parishes or unions as are governed by guardians, and if there are no such guardians, then by the overseers of a parish not governed by such guardians. The members of a district board are required to have such a property qualification not exceeding the net annual value of £40, as the Local Government Board may fix, and are elected for three years. The chairman of a board of guardians is *ex officio* a member of a district board. Every such board have the powers of guardians for the relief and management of the poor within any school or asylum (*ibid.* s. 43).

#### RELIEF OF THE POOR.

*Relief generally.*—It is the duty of the guardians to relieve the poor in their destitution (4 & 5 Will. IV. c. 76, ss. 38, 54). But this duty applies only to relieving existing destitution, and the guardians have no power to apply the rates in preventing a person becoming destitute, nor for purchasing tools or redeeming pledges, or for purposes of a like nature. But when the destitution is self-imposed and the guardians are satisfied that persons supported by the poor rate can obtain work at wages adequate for the maintenance of themselves and families, the guardians would be justified in refusing relief. But before they go to this length they must be in a position to state definitely where work can be obtained, and it is not sufficient to say vaguely to applicants that “employment may be had” (3 Off. Cir. 23). When work which a pauper can readily accept is offered at adequate wages, the Poor Law Board thought that it would be proper in most cases for the guardians to direct the discharge of the pauper to whom the employment is offered after due notice of their intention to do so. But if it is admitted that the man cannot procure a house, either in his own parish or elsewhere, the Board did not advise that he should be ejected from the workhouse against his will, so long as his inability to procure shelter for himself and family existed (7 Off. Cir. 199). To be entitled to relief, the applicant must be actually destitute of means, from his own resources, of obtaining food, clothing, and shelter necessary for his immediate wants; and unless he is so destitute, the authorities cannot interfere (cp. 43 Eliz. c. 2, s. 1).

Relief may be given on loan. It rests entirely with the guardians to determine in what manner relief should be given. An order for medical relief in midwifery cases may be given by way of loan. If the pauper is unable to repay the cost of relief given by way of loan, he can represent his inability to the board of guardians, and it is competent to them not to enforce it (4 Off. Cir. 123). Such a loan may be recovered before the justices under sec. 59 of the 4 & 5 Will. IV. c. 76, or in the County Court under the 11 & 12 Vict. c. 110, s. 8. The husband or father is considered as the person to whom the relief of his family is given, and he is liable not only for relief given to him, but given on his account (4 & 5 Will. IV. c. 76, s. 58).

By the Out-door Relief Friendly Societies Act, 1894 (57 & 58 Vict. c. 25), the guardians may grant relief to any person otherwise entitled, notwithstanding the fact that he is in receipt of a payment by a friendly society, and it is in the discretion of the guardians whether they take the amount of such payment into account in giving the relief.



Relief is sometimes given by guardians to paupers not settled in their union on account of the union in which they are legally settled. These are known as "non-settled poor." And the guardians of a union in which a pauper is settled, but does not reside, may relieve him through the agency of the guardians in whose union he may be. In such a case the pauper would come under the designation "non-resident poor." The relief of non-settled and non-resident poor is regulated by the General Order, 24th July 1847, arts. 77-80. The guardians may remit relief by other agency if they think fit, but if two boards agree to act together these rules must be observed.

*Relief by Relatives.*—By the 43 Eliz. c. 2, s. 6, the father and grandfather, and the mother and grandmother, and the children, of every poor, old, blind, lame, and impotent person, or other poor person not able to work, being of sufficient ability, shall at their own charges relieve and maintain every such poor person in that manner, and according to that rate as shall be assessed by the justices. This section applies to blood relations only (*R. v. Dempson*, 1734, 2 Stra. 955), and inability to work on the part of the person sought to be maintained is a condition precedent (*R. v. Gulley*, 1714, Foley, 47; 1 Bott P. L. Cas. 366). The order must state this by way of adjudication, and not merely as a recital of a complaint made (*R. v. Sitton*, 1719, Set. & Rem. 83, pl. 111; *R. v. Tripping*, 1718, 1 Bott P. L. Cas. 370; *R. v. Pennoyer*, 1727, 1 Bott P. L. Cas. 371). Inasmuch as the statute applies to blood relations only, a man cannot be compelled to contribute to the maintenance of his wife's mother (*R. v. Munday*, 1718, 1 Stra. 190; Set. & Rem. 91; 2 Raym (Ld.) 1454), or of his wife's child by a former husband (*Woodford v. Lilburn*, 1747, 1 Bott P. L. Cas. 375), or of his son's wife or widow (*R. v. Kempson*, 1734, 1 Bott P. L. Cas. 378), or of his own brother, as a brother is not mentioned in the statute (*R. v. Smith*, 1826, 2 Car. & P. 449). But a grandfather is liable for the maintenance of his grandchild although the father be alive, if the latter is unable to support him (*R. v. Joyce*, 1707, 16 Vin. Abr. 423; *R. v. Cornish*, 1831, 2 Barn. & Ald. 498; 23 J. P. 811), but a grandchild is not liable to support a grandfather (*Maund v. Mason*, 1874, L. R. 9 Q. B. 254; 43 L. J. M. C. 62; 38 J. P. 538). Adultery, if not condoned, discharges a husband from liability to maintain his wife (*Culley v. Charman*, 1881, 7 Q. B. D. 89); but it does not discharge a son (*In re Constable*, 1886, 31 Sol. Jo. 15). A woman under coverture is not bound to support her grandchild (*Coleman v. Birmingham Churchwardens*, 1881, 6 Q. B. D. 615; 50 L. J. M. C. 92; 45 J. P. 521). But she would have to support her children if she had separate property (33 & 34 Vict. c. 93, s. 14, and 45 & 46 Vict. c. 75, s. 14). The marriage of the mother does not relieve her children by a previous marriage of the liability to maintain her whilst living with her second husband (*Arrowsmith v. Dickenson*, 1887, 20 Q. B. D. 252; 52 J. P. 308; 36 W. R. 507; 58 L. T. 632). An order cannot be made on a putative father, or on the mother, to maintain an illegitimate child (*R. v. Maude*, 1843, 11 L. J. M. C. 120; 6 Turn. 646). An order of the justices made under this section is recoverable as a civil debt (Summary Jurisdiction Act, 1879, ss. 6, 35), and the six months' limitation in the 11 & 12 Vict. c. 43, s. 11, does not apply (*Ulverstone v. Park*, 1889, 53 J. P. 629). The justices have no power under the 43 Eliz. c. 2, s. 7, to order a relation to take the pauper into his house and maintain him (*R. v. Jones*, 1679, Foley, 41). By sec. 56 of the 4 & 5 Will. iv. c. 76, if a man marries a woman with a child, whether legitimate or illegitimate, he is bound to maintain it until it reaches the age of sixteen, or until the death of the



mother, and the child is to be deemed, for the purposes of that Act, part of his family.

A person being able to either wholly or partly maintain himself and his family, and wilfully refusing or neglecting to do so, whereby either he or they become chargeable, is to be deemed an idle and disorderly person, and to be dealt with as such (5 Geo. IV. c. 83, s. 3). An idle and disorderly person is liable to imprisonment for not exceeding one calendar month with hard labour, or a fine not exceeding £5 (*ibid.*, and Summary Jurisdiction Act, 1879, s. 4). *Mens rea* is necessary to conviction, and thus where a man stopped an allowance he had been making to his wife under a separation deed because he believed she had committed adultery subsequent to the deed, the Queen's Bench Division held that the justices had rightly dismissed the information. A husband cannot be dealt with under the above section for not maintaining his wife if she is a lunatic, and chargeable as such. In *Flannagan v. Bishop Wearmouth*, 1857, 27 L. J. M. C. 46; 22 J. P. 464, it was held that a man cannot be punished as an idle and disorderly person for refusing to maintain his wife if she refuses to live with him, nor if she has left him and is living in adultery with another man, although he himself may have been subsequently guilty of adultery (*R. v. Flintan*, 1830, 1 Barn. & Adol. 227). By the 31 & 32 Vict. c. 122, s. 33, the justices may make an order on a husband to contribute to the cost of relieving his wife if she has become chargeable. These proceedings may be taken by the guardians. An order may be made where the wife is living absent from her husband, and she refuses to return to him, if the justices find that she was justified in leaving and refusing to return to the husband's house (*Thomas v. Alsop*, 1870, L. R. 5 Q. B. 151; 34 J. P. 625; 39 L. J. 43). The order may be for a greater sum than will reimburse her amount actually paid in relief. Thus where the amount of relief which had been paid to a wife was three shillings a week, and the guardians proved that the husband's means were sufficient to enable him to allow his wife fifteen shillings a week, and the justices made an order for that amount, the order was held to be good. The section does not, however, entitle the justices to make an order in the nature of alimony (*Dinning v. South Shields' Union*, 1884, 13 Q. B. D. 25; 53 L. J. M. C. 90; 48 J. P. 708). Arrears under an order are recoverable as a civil debt. Since 1870 a married woman having separate property is similarly liable to be compelled to maintain her husband if he becomes chargeable (33 & 34 Vict. c. 93, s. 13, and 45 & 46 Vict. c. 75, s. 20). By sec. 71 of the Act 4 & 5 Will. IV. c. 76, the mother of an illegitimate child, so long as she shall be unmarried or a widow, is bound to maintain it as part of her family until it reaches the age of sixteen, and all relief granted to such child while under that age is deemed relief granted to the mother. But this liability ceases on the marriage of the child if a female. A soldier of the regular forces is liable to contribute to the maintenance of his wife and family to the same extent as if he were not a soldier; but execution shall not issue against his person, pay, etc.; nor shall he be liable to be punished for the offence of deserting or neglecting to maintain his wife or family, or any member thereof, or of leaving her or them chargeable to any union, parish, or place (Army Act, 1881, s. 145). By the same section and sec. 7 of the Army (Annual) Act, 1883, it is enacted that if a man becomes a soldier after an order has been made against him to contribute either to the cost of maintenance of his wife and child, or of any bastard child of which he is the putative father, or of the cost of any relief given to his wife or child by way of a loan, a copy of the order is to be sent to the Secretary of State; and in case of such order being so



sent, or it appearing to the satisfaction of a Secretary of State, that a soldier of the regular forces has deserted or left in destitute circumstances, without reasonable cause, his wife, or any of his legitimate children under fourteen years of age, the Secretary of State shall order a portion, not exceeding sixpence a day, of the daily pay of a non-commissioned officer who is not below the rank of a sergeant, and not exceeding threepence of the daily pay of any other soldier, to be deducted from such daily pay, and to be appropriated in the first case in liquidation of the sum adjudged to be paid by such order; and in the second case, towards the maintenance of such wife and children, in such manner as the Secretary of State thinks fit. Provision is made by the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60, s. 182), for the maintenance of a seaman's family while he is away on a voyage, by enacting that if the wife or children of any seaman become chargeable, the union is to be reimbursed out of his wages. Notice of the claim must be given to the owner of the ship (*ibid.* s. 183).

Every person running away and leaving his wife or his child or children chargeable, or whereby she or they, or any of them, shall become chargeable to any parish, township, or place, or to the common fund of the union, is punishable as a rogue and a vagabond, that is, by imprisonment with hard labour not exceeding three calendar months, or a fine not exceeding £25 (5 Geo. IV. c. 83, s. 4; 12 & 13 Vict. c. 103, s. 3). Proceedings may be taken for this offence at any time within two years after the commission of it, and the summons or warrant may be issued on the complaint of the relieving officer (39 & 40 Vict. c. 61, s. 19). The offence of desertion under 5 Geo. IV. c. 83, s. 4, is not complete until chargeability (*Reeves v. Yeates*, 1862, 31 L. J. M. C. 241). The word "child" in this statute does not include "bastard child," and therefore a man cannot be convicted of running away and leaving his wife's illegitimate child chargeable (*R. v. Maude*, 1843, 6 Turn. 646; 11 L. J. M. C. 120). In *Peters v. Cowie*, 1877, 2 Q. B. D. 131; 46 L. J. M. C. 177, the Court held that a married woman who, deserted by her husband, and having no means of supporting her children, leaves them so that they become chargeable, cannot be convicted under sec. 4 of the 5 Geo. IV. c. 83. By the 5 Geo. I. c. 8, the property of persons who run away and leave their families chargeable may be seized and sold under an order of the justices, and the proceeds paid over to the guardians, to be applied by them towards discharging the cost of maintaining the families so deserted and left chargeable. In the event of a bastard child becoming chargeable to the union after the mother has obtained an affiliation order, the justices may, under sec. 7 of the 35 & 36 Vict. c. 65, appoint a relieving officer of the union to receive, on account of the union, the payments ordered to be made by the father for so long as the child shall remain chargeable. Where the mother has not obtained an order, sec. 5 of the 26 Vict. c. 9 enables the guardians to proceed for one, and recover and retain the payments made under it. An application can be made by the guardians at any time whilst the child is under thirteen years of age. The mother of an illegitimate child has a natural right to the custody of it (*R. v. Nash, In re Carey*, 1883, 10 Q. B. D. 454; 52 L. J. Q. B. 442; 48 L. J. 447).

*The Workhouse.*—The establishment of workhouses is regulated by the 4 & 5 Will. IV. c. 76, and is under the control of the Local Government Board. Under sec. 23 the Board has power, with the consent of the majority of the guardians of a union, to order a workhouse to be built, and that land be acquired for a site. But where a workhouse already exists, the Local Government Board may, independently of the consent of the guardians, order it to be enlarged, and provided with proper drainage,



sewers, ventilation, fixtures, furniture, surgical and medical appliances, and other conveniences (*ibid.* s. 25; 31 & 32 Vict. c. 122, s. 8). But the guardians cannot be compelled to raise a principal sum for these purposes which exceeds one-tenth of the average annual amount of the rates raised for the relief of the poor during the three previous years (29 & 30 Vict. c. 113, s. 8). If the guardians themselves decide to enlarge, alter, or improve their workhouse at a cost not exceeding £500, and the Board give their consent thereto, they do not require any further order to enable them to do so (*ibid.*). By sec. 9 of the 34 & 35 Vict. c. 108, the guardians are bound to provide such casual wards, with fittings and furniture, as the Local Government Board deem necessary.

The guardians may, with the consent of the Local Government Board, borrow money for any permanent work or object, and their powers in this respect are now regulated by the 52 & 53 Vict. c. 56, s. 2. But loans incurred previously to that Act are still subject to the statutes in force at the time they were raised (*ibid.*). The guardians are required to keep a register of the securities in respect of all sums borrowed by them, in the form prescribed by the Local Government Board (45 & 46 Vict. c. 58, s. 14). For the purposes of relief, settlement, and removal of poor persons and the burial of the poor, the workhouse of any union is deemed to be situated in the parish in which each poor person respectively to be relieved, removed, or buried, is or has been chargeable. Births and deaths in a workhouse are to be registered in the parish or place where the workhouse is situated (7 & 8 Vict. c. 101, s. 56). With regard to the burial of any poor person dying in the workhouse of any union, sec. 10 of the 28 & 29 Vict. c. 79 directs that the workhouse is to be considered as situated in the parish in the union where the poor person last resided previously to being removed into the workhouse.

The guardians shall once at least in every year, and as often as may be necessary for cleanliness, cause all the rooms, wards, offices, and privies belonging to the workhouse to be limewashed (Order, 24th July 1847, art. 150). It is the duty of the master to take care that all the wards, rooms, larder, kitchen, and all the offices of the workhouse, and all the utensils and furniture thereof, are kept clean and in good order; and where any defect in the same occurs, to report it to the guardians (*ibid.* art. 208 (24)). It is the especial duty of the matron to assist the master in cleaning and ventilating the sleeping wards and dining hall, and all parts of the premises (*ibid.* art. 210 (13)). It is also the duty of the medical officer to report in writing to the guardians any defect in the drainage, ventilation, warmth, or other arrangements which he may deem detrimental to the health of the inmates (*ibid.* art. 207 (6)). These reports are to be entered in a book termed the Workhouse Medical Officer's Report-Book (General Order, 4th April 1868, art. 1), which is to be laid before the guardians (*ibid.* art. 2).

The guardians shall cause the workhouse and all its furniture and appurtenances to be kept in good and substantial repair; and shall, from time to time, remedy without delay any such defect in the repair of the house, its drainage, warmth, or ventilation, or in the furniture or fixtures thereof, as may tend to injure the health of the inmates (General Order, 24th July 1847, art. 151). The guardians are empowered to supply the workhouse with all requisite furniture and necessaries. It is for them to purchase what is necessary in this respect, and the (Local Government) Board cannot interfere in the matter. If the guardians should be of opinion that a collection of books for the use of the workhouse inmates is desirable, they are at liberty to exercise their own judgment in purchasing



what shall appear to them to be necessary, and it will be for the auditor to decide whether they have exceeded their legal powers (11 Off. Cir. 85).

*Visiting Committee.*—The guardians shall appoint one or more visiting committees from their own body; and each of such committees shall carefully examine the workhouse or workhouses of the union once in every week at the least, inspect the last reports of the chaplain and medical officer, examine the stores, afford, so far as is practicable, to the inmates an opportunity of making any complaints, and investigate any complaints that may be made to them (General Order, 24th July 1847, art. 168). If the guardians neglect to appoint a visiting committee, the Local Government Board may appoint a paid visitor, who cannot be one of the guardians; this appointment to cease next after the appointment of a visiting committee (10 & 11 Vict. c. 109, s. 24).

The visiting committee shall from time to time write such answers as the facts may warrant to the queries, which are to be printed in a book, entitled the visitor's book, to be provided by the guardians, and kept in every workhouse for that purpose, and to be submitted regularly to the guardians at their ordinary meetings (Order, 24th July 1847, art. 149).

The board of guardians, when they appoint the visiting committee, should specify the quorum who are to be empowered to act; but if no such quorum be named by the guardians, the Local Government Board think that all the members of the committee must act together (11 Off. Cir. 102). The visitor's book is intended to be kept for the exclusive use of the visiting committee, and all entries therein should be made by that committee. The members of the visiting committee are not authorised to act singly in making the entries in the visitor's book and reporting to the board of guardians; but it is, nevertheless, competent for any single member to visit the workhouse on the appointed days if his colleagues should be absent on the occasion (*ibid.*). Any member of the visiting committee may visit the workhouse at any time at which the committee could visit it collectively, unless the guardians should have given the committee only a limited authority to visit it so as to confine that authority to a majority or any fixed number or proportion of the members of the committee (2 Off. Cir. 173).

By Art. 2 of the General Order: Visitation of Workhouses, 26th January 1893—

any board of guardians may, if they think fit, from time to time, by resolution, appoint one or more committee or committees, consisting of persons of the female sex, whether members of the board of guardians or not, whose duty it shall be to visit and examine the parts of the workhouse or workhouses of the union or separate parish in which female paupers or pauper children are maintained, and to report to the board of guardians any matter which may appear to the committee to need attention. Provided that the proceeding, term of office, and duties of any such committee shall be subject to such rules and regulations as the board of guardians may from time to time prescribe. Provided also that the appointment of such a committee shall not in any way affect the duty of the board of guardians to appoint one or more visiting committees as required by the Order now in force, nor the powers and duties of any such visiting committee. With reference to the above, the Local Government Board have said that the term "workhouse" is intended to include any infirmary, school, or other similar establishment in the occupation of the guardians (Cir. Letter, 28th January 1893).

A ratepayer cannot as of right visit and inspect the workhouse; but it is usual to allow those who are desirous of seeing the workhouse to do so. Any guardian may, however, at any time, visit and examine any part of any workhouse of the union or separate parish of which he is the guardian (General Order: Visitation of Workhouses, 26th January 1893).



The Local Government Board have recommended that accommodation be provided for the temporary detention of persons who are alleged to be lunatics, and are sent to the workhouse under secs. 20, 21 of the Lunacy Act, 1890 (53 & 54 Vict. c. 5). Sec. 5 (4) of the Prevention of Cruelty Act, 1894 (57 & 58 Vict. c. 41), directs boards of guardians to provide for the reception of children brought to the workhouse in pursuance of that Act. The master is bound to receive children so brought. As to the management of workhouses generally, see *In-door Relief, infra*.

*In-door Relief*.—The Local Government Board, in a circular letter dated 2nd September 1871, state that in numerous instances (to which they refer) the guardians disregard the advantages which result not only to the rate-payers, but to the poor themselves, from the offer of in-door in preference to out-door relief, and that some guardians are inclined to imagine that out-door relief is more economical than in-door, because an individual or family costs more in the workhouse than the amount of out-door relief which would be given in the particular case out of it. This, no doubt, may be so in an individual case, but the guardians should bear in mind that out-door relief multiplies so largely the number of applicants, that if relief were afforded to all, the cost of such relief would greatly exceed that of maintaining in the workhouse such of the applicants as would be willing to enter it, as it is found by practical experience that when the workhouse test is offered it is not accepted in more than one case in ten. Following sec. 38 of the 4 & 5 Will. IV. c. 76, the General Consolidated Order, 24th July 1847, by Art. 152, declares that, subject to the rules and regulations therein contained, the guidance, government, and control of every workhouse, and of the officers, servants, assistants, and paupers within the workhouse, shall be exercised by the guardians of the union. With regard to the admission of paupers into the workhouse, it is provided that—

every pauper who shall be admitted into the workhouse, either upon his first or any subsequent admission, shall be admitted in some one of the following modes only ; that is to say :—

By a written or printed order of the board of guardians, signed by their clerk, according to Art. 42.

By a provisional written or printed order, signed by a relieving officer or an overseer.

By the master of the workhouse (or, during his absence or inability to act, by the matron), without any order, in any case of sudden or urgent necessity.

Provided that the master may admit any pauper delivered at the workhouse under an order of removal to a parish or union (art. 88). The justices may also order a child to be taken to the workhouse under sec. 19 of the Industrial Schools Act, 1866 ; and a person may be removed to the workhouse under the Lunacy Acts.

It is to be observed, generally, with respect to all persons who may apply for admission into the workhouse under circumstances of urgent necessity, that their destitution, coupled with the fact of their being within the union or parish, entitles them to relief ; and that their title to relief is altogether independent of their settlement (if they have one), which is a matter for subsequent inquiry, and only renders them liable to removal in consequence of their becoming chargeable (Instructional Letter, 5th February 1842). They should be admitted and discharged (but not during the performance of divine service) on Sundays and holidays the same as on other days. The master must also admit those who present a proper order, or who apply without one under urgent circumstances, at any time of night, but he is not in general bound to discharge a pauper in the night-time. With regard to paupers who are in the habit of frequently discharging themselves from workhouses, the guardians are, by sec. 4 of the 34 & 35 Vict. c. 108, empowered to direct that any pauper inmate of the workhouse, or the paupers of any class therein, shall not be entitled to discharge themselves until after the expiration of certain periods of notice of intention to quit the workhouse, not exceeding the following, that is to say :—

1. If the pauper has not previously discharged himself from the workhouse within one month before giving the notice, until after the expiration of twenty-four hours.



2. If he has discharged himself once or oftener within such month, until after the expiration of forty-eight hours.
3. If he has discharged himself more than twice within two months before giving the notice, until after seventy-two hours. The master has no authority to discharge a pauper from the workhouse against the pauper's wish, without directions from the board of guardians. A person suffering from mental disease or from bodily disease of an infectious or contagious character, may, on the advice of the medical officer, be detained in the workhouse until the medical officer certifies that the discharge may take place (30 & 31 Vict. c. 106, s. 22). If, on searching a pauper, money sufficient for his present maintenance is found upon him, the master should take possession of it, and hand it over to the guardians at their next meeting.

Overseers are only authorised to give relief in cases of "sudden and urgent necessity" (*ante*, p. 165). The giving of an order for the workhouse amounts to relief ; but such order is only operative until the next meeting of the guardians, and the master is not precluded from exercising his judgment as to the fact of the applicant being a pauper. If a pauper suffering from an infectious disease presents a provisional order for admission, he should be placed in the ward set apart for such cases ; and if he cannot be separated from the other inmates, the master should at once send for the relieving officer, who is bound to find some temporary accommodation. No pauper must be admitted to a workhouse under any order mentioned in Art. 88, if it bears date more than six days before the pauper presents it at the workhouse (Order, 24th July 1847, art. 89).

If a pauper be admitted otherwise than by an order of the board of guardians, the admission of such pauper shall be brought before the board of guardians at their next ordinary meeting, who shall decide on the propriety of the pauper's continuing in the workhouse or otherwise, and make an order accordingly (*ibid.* art. 90). As soon as the pauper is admitted, he shall be placed in some room appropriated for paupers on admission, and shall then be examined by the medical officer (*ibid.* art. 91). If the medical officer upon such examination pronounce the pauper to be labouring under any disease of body or mind, the pauper shall be placed in the sick ward, or in such other ward as the medical officer shall direct (*ibid.* art. 92). The law does not, however, permit of compulsion being resorted to to examine into the state of a sick pauper (being of sound mind) who refuses to allow an examination of his person to be made.

If the medical officer pronounce the pauper to be free from any such disease, the pauper shall be placed in the part of the workhouse assigned to the class to which he may belong (*ibid.* art. 93). No pauper shall be detained in a receiving ward for a longer time than is necessary for carrying into effect the regulations in Arts. 91, 92, and 93 (*supra*), if there be room in the proper ward for his reception (*ibid.* art. 94). Before being removed from the receiving ward, the pauper shall be thoroughly cleansed, and shall be clothed in a workhouse dress, and the clothes which he wore at the time of his admission shall be purified, and deposited in a place appropriated for that purpose, with the pauper's name affixed thereto. Such clothes shall be restored to the pauper when he leaves the workhouse (*ibid.* art. 95). Every pauper shall, upon his admission into the workhouse, be searched by or under the inspection of the proper officer, and all articles prohibited by any Act of Parliament, or by this order, which may be found upon his person, shall be taken from him, and, so far as may be proper, restored to him at his departure from the workhouse (*ibid.* art. 96).

The adult male paupers ought to be searched by the porter ; the female paupers and the children by the matron, or by some of the female servants under her direction.

The following are examples of prohibited articles :—

1. Spirituous or fermented liquors (4 & 5 Will. iv. c. 76, ss. 92–94).
2. Articles of food not allowed by the dietary (art. 101).
3. Letters or printed papers having an improper tendency (art. 119).
4. Cards or dice (art. 120).
4. Matches or lighting combustible articles (art. 121).

The officers of the workhouse are not empowered to take from paupers any money or trinkets which may be in their possession. If the guardians or their officers should become aware that any pauper is possessed of money, or other available property sufficient for his maintenance, they would be justified in withholding relief from such pauper during the time that he is able to maintain himself ; or they might proceed against him before a justice for being wilfully chargeable.

The guardians are not empowered to direct the hair of any adult pauper to be cut



off under ordinary circumstances, but only in some extraordinary cases where such a proceeding may be necessary for the protection of the health of the inmates of the house ; in no case will they be justified in forcibly cutting off the hair of adult female paupers of sane mind (cp. *Ford v. Skinner*, 1830, 4 Car. & P. 239).

A minute of instructions as to the bathing of workhouse inmates was issued by the Local Government Board on the 2nd February 1886.

The paupers, so far as the workhouse admits thereof, shall be classed as follows :—

- Class 1. Men infirm through age or any other cause.
- Class 2. Able-bodied men and youths above the age of fifteen years.
- Class 3. Boys above the age of seven years and under that of fifteen.
- Class 4. Women infirm through age or any other cause.
- Class 5. Able-bodied women and girls above the age of fifteen years.
- Class 6. Girls above the age of seven years and under that of fifteen.
- Class 7. Children under seven years of age ; to each class shall be assigned that ward or separate building and yard which may be best fitted for the reception of such class, and each class of paupers shall remain therein, without communication with those of any other class (*ibid.* art. 98).

By sec. 26 of the 4 & 5 Will iv. c. 76, the Local Government Board is empowered to issue such rules, orders, and regulations as they deem expedient for the classification of paupers in workhouses. Art. 99 of the General Order of 24th July 1847 provides—

1st. That the guardians shall from time to time, after consulting the medical officer, make such arrangements as they may deem necessary with regard to persons labouring under any disease of body or mind.

2nd. The guardians shall, so far as circumstances will permit, further sub-divide any of the classes enumerated in Art. 89, with reference to the moral character or behaviour, or the previous habits of the inmates, or to such other grounds as may seem expedient. This is an important provision, enabling the guardians to place persons of bad character in classes by themselves, so that they may not contaminate the virtuous and well-conducted inmates of the house.

3rd. That nothing in this Order shall compel the guardians to separate any married couple, being both paupers of the first and fourth classes respectively, provided the guardians shall set apart for the exclusive use of every such couple a sleeping apartment separate from that of the other paupers. The regulation, in consequence of which a husband and his wife are separated during their residence in the workhouse, has been by many persons considered objectionable. A regulation of this sort is required by the internal arrangements of a workhouse ; for, in order that all married couples should live together in a workhouse, in a manner consistent with decency and propriety, it would be necessary not only that internal arrangements and discipline of workhouses should be altogether altered, but that their size and cost should be greatly increased. Aged married couples (whose residence in the workhouse is likely to be of longer duration than that of able-bodied persons), the guardians may (independently of the statutes above cited), by observing the forms prescribed in this proviso, place in a separate sleeping apartment. Moreover, the guardians can allow out-door relief to any aged couple whom it may be inexpedient from any cause to retain in the workhouse (Inst. Letter, 5th February 1842).

4th. That any paupers of the fifth and sixth classes may be employed constantly or occasionally in any of the female sick wards, or in the care of infants, or as assistants in the household work ; and the master and matron shall make such arrangements as may enable the paupers of the fifth and sixth classes to be employed in the household work, without communication with the paupers of the second and third classes.

5th. That any pauper of the fourth class, whom the master may deem fit to perform any of the duties of a nurse or an assistant to the matron, may be so employed in the sick wards or those of the fourth, fifth, sixth, or seventh classes, and any pauper of the first class, who may by the master be deemed fit, may be placed in the ward of the third class, to aid in the management, and superintend the behaviour, of the paupers of such class, or may be employed in the male sick ward.

6th. That the guardians, for a special reason to be entered in their minutes, may place any boy or girl, between the ages of ten and sixteen years, in a male



or female ward respectively, different from that to which he or she properly belongs, unless the Local Government Board shall otherwise direct.

7th. That the paupers of the seventh class may be placed in such of the wards appropriated to the female paupers as shall be deemed expedient, and the mothers of such paupers shall be permitted to have access to them at all reasonable times.

8th. That the master (subject to any directions given or regulations made by the guardians) shall allow the father or mother of any child in the same workhouse, who may be desirous of seeing such child, to have an interview with such child at some one time in each day, in a room in the said workhouse to be appointed for that purpose. And the guardians shall make arrangements for permitting the members of the same family who may be in different workhouses of the union to have occasional interviews with each other, at such times, and in such manner, as may best suit the discipline of the several workhouses.

Art. 208 (14) requires the master to apprise the nearest relation in the workhouse of the sickness of any pauper; and by subsec. 16 of the same article it is his duty to give immediate information of the death of any pauper in the workhouse to the nearest relations of the deceased who may be known to him, and who may reside within a reasonable distance. Art. 100 directs the guardians not to admit into the workhouse a greater number of paupers than it was built to contain, and in case that number should be at any time exceeded, the fact is to be forthwith reported to the Local Government Board by the clerk.

No pauper of unsound mind, who may be dangerous, or who may have been reported as such by the medical officer, or who may require habitual or frequent restraint, shall be detained in the workhouse for any period exceeding fourteen days, and the guardians shall cause the proper steps to be taken for the removal of every such pauper to some asylum or licensed house as soon as may be practicable (*ibid.* art. 101).

Sec. 45 of the 4 & 5 Will. IV. c. 76 enacts that "nothing in this Act contained shall authorise the detention in any workhouse of any dangerous lunatic, insane person, or idiot, for any longer period than fourteen days, and every person wilfully detaining in any workhouse any such lunatic, insane person, or idiot, for more than fourteen days, shall be deemed guilty of a misdemeanour." The words, "dangerous lunatic, insane person, or idiot," in this clause, according to the opinion of the law officers of the Crown given to the Poor Law Commissioners, are to be read "dangerous lunatic, dangerous insane person, or dangerous idiot."

All the paupers in the workhouse, except the sick and insane, and the paupers of the first, fourth, and seventh classes, shall rise, be set to work, leave off work, and go to bed at the times mentioned in the Form (N.), *infra*, and shall be allowed such intervals for their meals as are therein stated, and these several times shall be notified by the ringing of a bell: Provided always, that the guardians may, with the consent of the Commissioners, make such alterations in any of the said times or intervals, as the guardians may think fit (*ibid.* art. 102).

FORM (N.).

|                                 | Time of Rising.        | Interval for Breakfast.        | Time for Work. | Interval for Dinner. | Time for Work. | Interval for Supper. | Time for going to Bed. |
|---------------------------------|------------------------|--------------------------------|----------------|----------------------|----------------|----------------------|------------------------|
| From 25th March to 29th Sept. } | $\frac{1}{4}$ before 6 | From $\frac{1}{2}$ past 6 to 7 | From 7 to 12   | From 12 to 1         | From 1 to 6    | From 6 to 7          | 8 o'clock              |
| From 29th Sept. to 25th March } | $\frac{1}{4}$ before 7 | From $\frac{1}{2}$ past 7 to 8 | From 8 to 12   | From 12 to 1         | From 1 to 6    | From 6 to 7          | 8 o'clock              |



Half an hour after the bell shall have been rung for rising, the names of the paupers shall be called over by the master and matron respectively, in the several wards provided for the second, third, fifth, and sixth classes, when every pauper belonging to the respective wards shall be present, and shall answer to his name, and be inspected by the master and matron respectively, provided that the paupers of the third and sixth classes may be called over and inspected by the schoolmaster and schoolmistress (*ibid.* art. 103).

The master and matron shall (subject to the directions of the guardians) fix the hours of rising and going to bed, for the paupers of the first, fourth, and seventh classes, and determine the occupation of which they may be capable; and the meals for such paupers shall be provided at such times and in such manner as the guardians may from time to time direct (*ibid.* art. 106).

The meals shall be taken by all the paupers, except the sick, the children, persons of unsound mind, casual poor wayfarers, women suckling their children, and the paupers of the first and fourth classes, in the dining hall or day-room, and in no other place whatever, and during the time of meals order and decorum shall be maintained (*ibid.* art. 104). No pauper of the second, third, fifth, or sixth classes shall go to, or remain in, his sleeping room, either in the time hereby appointed for work, or in the intervals allowed for meals, except by permission of the master or matron (*ibid.* art. 105). The paupers shall be dieted with food in the manner set forth in the dietary table which may be prescribed for the use of the workhouse, and no pauper shall have or consume any liquor, or any food or provision other than is allowed in the said dietary table, except on Christmas Day, or by direction in writing of the medical officer, as provided by Art. 108 (*ibid.* art. 107).

Provided—1st. That the medical officer may direct in writing such diet for any individual pauper as he may deem necessary, and the master shall obey such direction until the next ordinary meeting of the guardians, when he shall report the same in writing to the guardians.

2nd. That if the medical officer at any time certify that he deems a temporary change in the diet essential to the health of the paupers in the workhouse, or of any class or classes thereof, the guardians shall cause a copy of such certificate to be entered on the minutes of their proceedings, and may forthwith order, by a resolution, the said diet to be temporarily changed, according to the recommendation of the medical officer, and shall forthwith transmit a copy of such certificate and resolution to the Commissioners.

3rd. That the medical officer shall be consulted by the matron as to the nature of the food of the infants, and of their mothers when suckling, and the time at which such infants should be weaned.

4th. That the guardians may, without any direction of the medical officer, make such allowance of food as may be necessary to paupers employed as nurses or in the household work; but they shall not allow to such paupers any fermented or spirituous liquors on account of the performance of such work, unless in pursuance of a written recommendation of the medical officer (*ibid.* art. 108).

The medical officer cannot order beer and wine, as extras, to any of the workhouse inmates, whether aged or infirm, or otherwise, merely as comforts. He can only prescribe them as medicines, or as things specifically required for health (7 Off. Cir. 304). By a General Order, dated 3rd November 1892, tobacco or snuff may be allowed to such of the inmates of the workhouse, who are not able-bodied, or are employed upon work of a specially disagreeable character, as the guardians may consider should be supplied with the same, the quantity to be allowed in each case, or in any class of cases, to be such as the guardians may by resolution prescribe. The guardians may, if they think fit, cause dry tea, with sugar and milk, to be supplied to such of the female inmates of the workhouse as they may consider should be supplied with the same, the quantity to be allowed in each case, or in any class of cases, to be such as the guardians by resolution



prescribe (General Order, Workhouse Regulations, 9th March 1894 art. 1). The allowances authorised by the guardians are in addition to the tea prescribed by the dietary in force in the workhouse (Cir. Letter, 10th March 1894).

If any pauper require the master or matron to weigh the allowance of provisions served out at any meal, the master or matron shall forthwith weigh such allowance in the presence of the pauper complaining, and of two other persons (General Order, 24th July 1847, art. 109).

The clothing to be worn by the paupers in the workhouse shall be made of such materials as the board of guardians may determine (*ibid.* art. 110).

The clothing worn by the paupers need not necessarily be uniform, either in colour or materials. It should be stamped with the name of the union, but not so as to be seen when worn. Sec. 2 of the 55 Geo. III. c. 137 provides that the stamp or mark shall not be placed on any articles of wearing apparel so as to be publicly visible on the exterior of the same.

With respect to the use of a penal dress in the workhouse, see Poor Law Commissioners, Sixth Annual Report, p. 98, which contains their reasons for disapproving of the practice of causing paupers to wear a distinguishing dress as a mark of disgrace.

More than two paupers, any one of whom is above the age of seven years, shall not be allowed to occupy the same bed, unless in the case of a mother and infant children (*ibid.* art. 111).

The paupers of the several classes shall be kept employed according to their capacity and ability; and no pauper shall receive any compensation for his labour (*ibid.* art. 112).

By Art. 114, the boys and girls who are inmates of the workhouse shall, for three of the working hours, at least, be instructed in reading, writing, arithmetic, etc., but this article has been rescinded in many unions, and provision made for the application of provisions similar to those contained in the Elementary Education Acts.

Any pauper may quit the workhouse upon giving to the master, or (during his absence or inability to act) to the matron, a reasonable notice of his wish to do so; and in the event of any able-bodied pauper, having a family, so quitting the house, the whole of such family shall be sent with him, unless the guardians shall, for any special reason, otherwise direct; and such directions shall be in conformity with the regulations of the Local Government Board with respect to relief in force at the time (*ibid.* art. 115).

The Poor Law Commissioners expressed the opinion that the guardians and the master of the workhouse, as their officer, have over orphan children or children deserted by their parents, the same control which a guardian possesses over his ward; and that they may therefore detain in the workhouse any such infant under the age of sixteen, provided that they have reasonable grounds for believing that leaving the workhouse would be attended with injurious consequences to the child. The guardians, however, are not authorised to detain in the workhouse young persons above sixteen years of age, who have no friends and are not going into service (Inst. Letter, 5th February 1842).

The mother of a legitimate child or of an illegitimate child should, on leaving the workhouse, take her child with her. The mother of an illegitimate child has a natural right to its custody as against strangers (*R. v. Nash*, 1883, 10 Q. B. D. 454). But a putative father cannot as of right remove his bastard child from the custody of the guardians (*R. v. St. Mary Abbots, Kensington*, 1887, 51 J. P. 740). Where a woman refused to take her bastard child with her on quitting the workhouse, the Poor Law Board advised that the child should be sent out with the mother, and if she then left the child, it should be at once received back, and proceedings taken against the mother under the Vagrant Act, 1824, and the Poor Law Amendment Act, 1844 (7 Off. Cir. 160).



If the guardians are satisfied that any pauper will have sufficient means of support outside the workhouse, but the pauper refuses to be discharged, they may cause him to be put out, and, if necessary, may call in a constable for that purpose (9 Off. Cir. 112). Provided, nevertheless, that the guardians may, by any general or special direction, authorise the master to allow a pauper, without giving any such notice as is required in Art. 115, to quit the workhouse, and to return after temporary absence only ; and every such allowance shall be reported by the master to the guardians at their next ordinary meeting (Order, 24th July 1847).

Provided also, that nothing herein contained shall prevent the master from allowing the paupers of each sex under the age of fifteen, subject to such restrictions as the guardians may impose, to quit the workhouse under the care and guidance of himself, or the matron, schoolmaster, schoolmistress, porter, or some one of the assistants and servants of the workhouse, for the purpose of exercise (*ibid.* art. 117). By Art. 212 (3) it is made the duty of the schoolmaster and schoolmistress to accompany the children on these occasions, unless the guardians should otherwise direct.

Any person may visit any pauper in the workhouse by permission of the master, or (in his absence) of the matron, subject to such conditions and restrictions as the guardians may prescribe ; such interview shall take place in a room separate from the other inmates of the workhouse, and in the presence of the master, matron, or porter, except where a sick pauper is visited (*ibid.* art. 118).

No written or printed paper of an improper tendency, or which may be likely to produce insubordination, shall be allowed to circulate or be read aloud among the inmates of the workhouse (*ibid.* art. 119).

No pauper shall play at cards or at any game of chance in the workhouse ; and the master may take from any pauper, and keep, until his departure from the workhouse, any cards, dice, or other articles applicable to games of chance which may be in his possession (*ibid.* art. 120).

The guardians may from time to time, by resolution, determine in what rooms and at what times smoking shall be allowed, and no pauper shall smoke in the workhouse in any other room or at any other time than is so allowed (General Order, 3rd November 1892). This Order rescinded Art. 121 of the Order of 24th July 1847, which forbade smoking altogether.

Any licensed minister of the religious persuasion of an inmate of the workhouse, who may at any time in the day, on the request of any inmate, enter the workhouse for the purpose of affording religious assistance to him, or for the purpose of instructing his child or children in the principles of his religion, shall give such assistance or instruction so as not to interfere with the good order and discipline of the other inmates of the workhouse, and such religious assistance or instruction shall be strictly confined to inmates who are of the religious persuasion of such minister, and to the children of such inmates, except in the cases in which the guardians may lawfully permit religious assistance and instruction to be given to any paupers who are Protestant dissenters, by licensed ministers who are Protestant dissenters (*ibid.* art. 122).

By the 4 & 5 Will. IV. c. 76, s. 19, no inmate of any workhouse is obliged to attend any religious service which may be contrary to his religious principles, and any licensed minister of the religious persuasion of any inmate of such workhouse, may at all times of the day, on the request of such inmate, visit such for the purpose of affording religious assistance to such inmate, and also for the purpose of instructing his child or children in the principles of their religion.

By sec. 21 of the 31 & 32 Vict. c. 122, it is enacted that, subject to the regulations to be approved by the Local Government Board, every inmate may attend some place of worship within a convenient distance from the workhouse where a service according to his creed is not provided in the workhouse.



Any pauper, being an inmate of the workhouse, who shall neglect to observe such of the regulations in this Order as are applicable to him as such inmate—

- Or who shall make any noise when silence is ordered to be kept ;
- Or shall use obscene or profane language ;
- Or shall by word or deed insult or revile any person ;
- Or shall threaten to strike or to assault any person ;
- Or shall not duly cleanse his person ;
- Or shall refuse or neglect to work, after having been required to do so ;
- Or shall pretend sickness ;
- Or shall play at cards or other game of chance ;
- Or shall refuse to go into his proper ward or yard, or shall enter or attempt to enter, without permission, the ward or yard appropriated to any class of paupers other than that to which he belongs ;
- Or shall climb over any fence or boundary wall surrounding any portion of the workhouse premises, or shall attempt to leave the workhouse otherwise than through the ordinary entrance ;
- Or shall misbehave in going to, at, or returning from public worship out of the workhouse, or at divine service or prayers in the workhouse ;
- Or having received temporary leave of absence, and wearing the workhouse clothes, shall return to the workhouse after the appointed time of absence, without reasonable cause for the delay ;
- Or shall wilfully disobey any lawful order of any officer of the workhouse ;

shall be deemed disorderly (Order, 24th July 1847, art. 127).

Any pauper, being an inmate of the workhouse, who shall, within seven days, repeat any one, or commit more than one, of the offences specified in Art. 127—

- Or who shall by word or deed insult or revile the master or matron, or any other officer of the workhouse, or any of the guardians ;
- Or shall wilfully disobey any lawful order of the master or matron after such order shall have been repeated ;
- Or shall unlawfully strike or otherwise unlawfully assault any person ;
- Or shall wilfully or mischievously damage or soil any property whatsoever belonging to the guardians ;
- Or shall wilfully waste or spoil any provisions, stock, tools, or materials for work belonging to the guardians ;
- Or shall be drunk ;
- Or shall act or write indecently or obscenely ;
- Or shall wilfully disturb other persons at public worship out of the workhouse, or at divine service ;

shall be deemed refractory (*ibid.* art. 128).

Art. 129 gives the master power to punish a refractory pauper by substituting a prescribed limited diet for forty-eight hours; and Art. 130 enables the guardians to add twenty-four hours' confinement to the above.

If any offence, whereby a pauper becomes refractory under Art. 128, be accompanied by any of the following circumstances of aggravation; that is to say, if such pauper—

- Persist in using violence against any person ;
- Or persist in creating a noise or disturbance, so as to annoy other inmates ;
- Or endeavour to excite other paupers to acts of insubordination ;
- Or persist in acting indecently or obscenely in the presence of any other inmate ;
- Or persist in mischievously breaking or damaging any goods or property of the guardians ;

the master may, without any direction of the guardians, immediately place such refractory pauper in confinement for any time not exceeding twelve hours; which confinement shall, however, be reckoned as part of any punishment afterwards imposed by the guardians for the same offence (*ibid.* art. 131).

No child under twelve years of age shall be punished by confinement in a dark room or during the night (*ibid.* art. 136).

No corporal punishment shall be inflicted on any male child, except by the school-master or master (*ibid.* art. 137). No corporal punishment shall be inflicted on any female child (*ibid.* art. 138). No corporal punishment shall be inflicted on any male child, except with a rod or other instrument, such as may have been approved of by the guardians or the visiting committee (*ibid.* art. 139). No corporal punishment shall be



inflicted on any male child until two hours shall have elapsed from the commission of the offence for which such punishment is inflicted (*ibid.* art. 140). Whenever any male child is punished by corporal correction, the master and schoolmaster shall (if possible) be both present (*ibid.* art. 141). No male child shall be punished by flogging whose age may be reasonably supposed to exceed fourteen years (*ibid.* art. 142).

The record which is directed by the following article to be kept is of the utmost importance for the prevention of abuse. The details of offences and punishments must be accurately and punctually entered in the book; and if any case should not be properly reported, it will be presumed the omission originates in a sense of the expediency of concealment (Inst. Letter, 5th February 1842).

Art. 143. The master shall keep a book to be furnished him by the guardians, in the prescribed form in which he shall duly enter—

1st. All cases of refractory or disorderly paupers, whether children or adults, reported to the guardians for their decision thereon.

2nd. All cases of paupers, whether children or adults, who may have been punished without the direction of the guardians, with the particulars of their respective offences and punishments.

The person who punishes any child with corporal correction shall forthwith report to the master the particulars of the offence and punishment; and the master shall enter the same in the book specified in Art. 143 (*ibid.* art. 144).

Such book shall be laid on the table at every ordinary meeting of the guardians; and every entry made in such book since the last ordinary meeting shall be read to the board by the clerk (*ibid.* art. 145).

If any pauper above the age of fourteen years unlawfully introduce or attempt to introduce any spirituous or fermented liquor into the workhouse, or abscond from the workhouse with clothes belonging to the guardians, the master may cause such pauper to be forthwith taken before a justice of the peace, to be dealt with according to law. And, whether he do so or not, he shall report every such case to the guardians at their next meeting (*ibid.* art. 146). By the 4 & 5 Will. IV. c. 76, s. 92, any person introducing or attempting to introduce spirituous liquors into a workhouse may be apprehended by the master or someone acting under his direction, and brought before a justice of the peace, and upon conviction may be fined, not exceeding £10, and in default imprisoned for not more than two calendar months. The 55 Geo. III. c. 137, s. 2, provides that—

if any person or persons shall run away from any workhouse and carry with him any clothes, etc., the property of the guardians, such person may be apprehended and brought before a justice of the peace, and, upon conviction, be sentenced to three months' imprisonment.

The master shall cause a legible copy of Arts. 127–131 to be kept suspended in the dining hall of the workhouse, or in the room in which the inmates usually eat their meals, and also in the board-room of the guardians (Order, 24th July 1847, art. 147).

*Casual Paupers.*—The term “casual pauper” means any destitute wayfarer or wanderer applying for or receiving relief (General Order, 18th December 1882).

It has been pointed out by the then Poor Law Board in an Instructional Letter, dated 28th November 1868, that it is of the utmost importance that there should be a sound and vigilant discrimination as regards those who apply for relief as casual poor, with a view to distinguish between those who are really destitute, and those who, not being destitute, throw themselves habitually on the rates or on private charity. With this object in view, arrangements have been made in many parts of the country with the police to act as assistant relieving officer of vagrants. The advantages of this course seem to be that the professional tramp is comparatively unwilling to confront such an officer, while to the honest but destitute wayfarer his inquiries occasion no alarm.

In consequence of the passing of the Casual Poor Act, 1882, the Local



Government Board issued a General Order, dated 18th December 1882, Art. 3 of which provides that a casual pauper shall not be admitted into any casual ward except upon an order signed either by a relieving officer or assistant relieving officer, or, in cases of sudden and urgent necessity, by an overseer.

Provided as follows:—

1. The master of the workhouse (or during his absence or inability to act, the matron) or the superintendent of the casual ward shall admit any casual pauper without an order, where the case appears to be one of sudden or urgent necessity.
2. The master or matron of any workhouse or the superintendent of any casual ward in the Metropolis shall admit without an order any person brought to the casual ward by a constable, in pursuance of sec. 4 of the Metropolitan Houseless Poor Act, 1865, if there be room for him in such ward.
3. Where a person is refused admission to a casual ward, a record of the name of applicant and of the circumstances under which he was refused admission shall be entered by the master, matron, or superintendent in a book, and laid before the guardians at their next meeting.

By sec. 4 of the Metropolitan Houseless Poor Act, 1865, any constable of the metropolitan police, or of the police of the city of London, may conduct any destitute person or wayfarer, who has not, to the constable's knowledge, committed any punishable offence, to the wards or other places of reception approved by the (Local Government) Board.

The following regulations, subject, however, as regards the metropolis, to the provisions of secs. 4 and 5 of the Metropolitan Houseless Poor Act, 1865, shall be observed with respect to orders of admission:—

1. The order shall, in addition to any other particulars which may be required, show the hour and place at which it was given:
2. The order shall be available only on the day on which it was issued:
3. The order shall not be available for admission earlier than four o'clock in the afternoon during the months between October and March, both inclusive, or earlier than six o'clock in the afternoon during the months between April and September, both inclusive, nor unless it has been presented within a reasonable time after it has been obtained, except where at the time of the presentation of the order the master or matron of the workhouse or the superintendent of the workhouse may consider the case to be one of sudden or urgent necessity (Order, 18th December 1882, art. 4).

Whenever the workhouse or casual wards are full, the master should inform all applicants for admission of the address of the relieving officer. Art. 5 provides for the search of every casual pauper on admission. Money found on a casual pauper is to be applied to the common fund of the union (Poor Law Amendment Act, 1848, s. 10).

Every casual pauper shall, as soon as practicable after his admission, be cleansed in a bath with water of suitable temperature: Provided that this regulation shall not be enforced if, on account of the state of health of the pauper or other circumstances, there is reason to believe that the use of the bath would be injurious (Order, 28th January 1882, art. 6).

The clothing worn by a casual pauper shall, after his admission, be taken from him, and if requisite be dried or disinfected, and such garment or garments as the guardians may deem necessary shall be supplied to him for the night, his own clothes being returned to him in the morning (*ibid.* art. 7).

The master of the workhouse or the superintendent of the casual ward shall duly keep, or cause to be kept, a book containing the particulars set forth in the form in Sched. A. annexed to this Order, and such other particulars as may be required by the guardians; and such book shall be laid before the guardians at such times as they may appoint, and shall be submitted to the district auditor at the usual audits, and at other audits when required by him (*ibid.* art. 8).

A casual pauper is not entitled to discharge himself from a casual ward before nine



o'clock in the morning of the second day following his admission, nor before he has performed the work prescribed for him. If he has been admitted on more than one occasion during one month into any casual ward of the same union, he is not entitled to discharge himself until nine o'clock in the morning of the fourth day after his admission.

Provided as follows:—

- (1) The guardians may give any directions to the master of the workhouse, or to the superintendent of the casual ward, with respect to the discharge of any class or classes of casual paupers before the expiration of the respective periods specified in the section above cited, and such directions shall be followed by the master or superintendent.
- (2) If in the opinion of the master of the workhouse, or the superintendent of the casual ward, any special circumstances shall require that a casual pauper shall be discharged before the expiration of either of the periods mentioned in the section above cited, he may discharge such pauper accordingly, and shall report the facts of the case to the guardians at their next meeting (*ibid.* art. 9).

The above provisoes have been amended by the addition thereto of the following proviso:—

- (3) A casual pauper, who has been detained for more than one night, and who represents to the master of the workhouse or the superintendent of the casual ward that he is desirous of seeking work, shall, if he has to the best of his ability performed the prescribed task of work, be allowed to discharge himself at the time hereinafter mentioned on the day upon which he is discharged—that is to say, during the period from Lady Day to Michaelmas Day, half-past five o'clock in the morning; during the period between Michaelmas Day and Lady Day, half-past six o'clock in the morning. The dietaries for casual paupers are prescribed by the General Order, 18th December 1882, art. 10, and the General Order (Metropolis) Dietary of Casual Paupers, 3rd November 1887, and the task of work to be performed by them by Art. 11 of the former Order.

Disobedience to the regulations constitutes the pauper an idle and disorderly person within the meaning of sec. 3 of the 5 Geo. IV. c. 83, who may be dealt with accordingly.

Sec. 7 of the Pauper Inmates Discharge and Regulation Act, 1871, 34 & 35 Vict. c. 108, provides that any pauper who—

- (1) Absconds or escapes from or leaves any casual ward before he is entitled to discharge himself therefrom; or
- (2) Refuses to be removed to any workhouse or asylum under the provisions of this Act; or
- (3) Absconds or escapes from or leaves any workhouse or asylum during the period for which he may be detained therein; or
- (4) Wilfully gives a false name or makes a false statement for the purpose of obtaining relief,

shall be deemed an idle and disorderly person within the meaning of sec. 3 of the 5 Geo. IV. c. 83.

And every pauper who—

- (1) Commits any of the offences before mentioned, after having been previously convicted as an idle and disorderly person; or
- (2) Wilfully destroys or injures his own clothes, or damages any property of the guardians, shall be deemed a rogue and a vagabond within the meaning of sec. 4 of the same Act.

Sec. 44 of the Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), provides that the word “pauper” in the 34 & 35 Vict. c. 108, sec. 7 (5), shall include any person who shall obtain relief by wilfully giving a false name, or making a false statement, and such person may be



proceeded against as an idle and disorderly person at any time while he continues to receive such relief.

Sec. 5 of the Casual Poor Act, 1882 (45 & 46 Vict. c. 36), provides that if a person, for the purpose of obtaining relief, either for himself or any other person, wilfully gives a false name, or makes a false statement, to the guardians or their officers, he shall be deemed an idle and disorderly person within the meaning of sec. 3 of the Act 5 Geo. IV. c. 83.

*Out-door Relief.*—Out-door relief, as the term implies, is the relief given by the guardians to persons who are not compelled to live in the workhouse. Out-door relief may not lawfully be given to every person entitled to relief from the rates, but is restricted to certain cases, as will be seen later on.

The regulations as to the administration of out-door relief are contained in the Out-door Relief Prohibitory Order, 21st December 1844, and the Out-door Relief Regulation Order, 14th December 1852. The first of these orders prescribes the following regulations:—

By Art. 1, every able-bodied person, male or female, requiring relief from any parish within any of the said unions, shall be relieved wholly in the workhouse of the union, together with such of the family of every such able-bodied person as may be resident with him or her, and may not be in employment, and together with the wife of every such able-bodied male person, if he be a married man, and if she be resident with him, save and except in the following cases:—

1st. Where such person shall require relief on account of sudden and urgent necessity.

The words “sudden and urgent necessity” are understood to mean any case of destitution requiring instant relief. This exception does not authorise permanent out-door relief in any case. A case, originally of sudden and urgent necessity, which subsequently requires continued relief, loses its character of suddenness and urgency. The relief subsequently required will be either ordinary relief, and therefore to be given in the workhouse, or it may be extraordinary, and given, for example, under the second exception to Art. 1 (*infra*). The overseers, by the enactment above referred to, are empowered to give temporary out-door relief in a case of sudden and urgent necessity (see p. 165).

2nd. When such person shall require relief on account of any sickness, accident, or bodily or mental infirmity affecting such person or any of his or her family.

This provides for the case of any able-bodied man who is himself insane, or temporarily sick, or who has met with an accident, or any of whose family required to be relieved on the ground of insanity, infirmity, accident, or sickness (Inst. Letter, 21st December 1844). The case of a woman who is actually confined in child-birth, will be a case of sickness coming within this exception. In the case of a domestic servant becoming ill, and requiring the service of the union medical officer, the Poor Law Board expressed the opinion that the guardians or their officers should narrowly investigate the circumstances of every case in which their interference is requested (7 Off. Cir. 297).

3rd. Where such person shall require relief for the purpose of defraying the expenses, either wholly or in part, of the burial of any of his or her family.

Relief may be given to able-bodied persons for the funerals of any members of their families, without requiring them to come into the work-



house (Inst. Letter, 21st December 1844). As to the burial of paupers, see p. 200.

4th. Where such person, being a widow, shall be in the first six months of her widowhood.

The exception of widows during the first six months of their widowhood is adopted with a view of making such arrangements for their support as their altered condition may require (Inst. Letter, 21st December 1844; see also 9 & 10 Vict. c. 66, s. 2). The exception refers to all widows, whether they come within the next exception or not. If an able-bodied widow have no child or children dependent upon her for support, out-door relief cannot be granted to her beyond the six months named in this article, without the previous consent of the Local Government Board, obtained under Art. 6 (*infra*).

5th. Where such person shall be a widow, and have a legitimate child or children dependent upon her, and incapable of earning his, her, or their livelihood, and have no illegitimate child born after the commencement of her widowhood.

The exception of widows with children, so far as it relates to able-bodied widows in employment, is one respecting which the guardians ought to exercise great circumspection in applying it in practice. The guardians, when administering relief under it, ought to take into account that when small weekly allowances in aid of wages are made, they too commonly serve to excuse relatives from the payments of contributions to a larger amount, and that the out-door allowance, when given indiscriminately in widowhood, tends to put an end to provident habits, in respect of insurances, in sick clubs, or otherwise. It should, moreover, be borne in mind, that allowances made by the parish to able-bodied widows in employment do not always confer the advantages intended, inasmuch as their wages, as in the case of able-bodied men, are often reduced in consideration of the allowance from the parish; and that such reduction of wages, combined with the excuse furnished to relatives or friends for withholding their contributions, together with the pauper habits thus engendered, often renders such allowances to widows in aid of wages an injury rather than a benefit to them; whilst in some districts this class of able-bodied widows may be so numerous that their labour thus depreciated at the expense of the ratepayers may be substituted for the more highly paid labour of independent labourers. It only seems necessary to observe further, in reference to this exception, that if a woman after her widowhood has an illegitimate child, her case will no longer be within the exception; but if the illegitimate child should afterwards die, her case will again fall within the exception, and the guardians will be at liberty to give her out-door relief if they think fit so to do. But note the omission "dependent upon her," in the last part of the exception. If a widow have an illegitimate child not dependent upon her, and legitimate children who are dependent upon her, her case will come within the exception so long as the illegitimate child lives. The Local Government Board recommend that in the case of any able-bodied widow with more than one child, it may be desirable to take one or more of the children into the workhouse in preference to giving out-door relief, and that out-door relief should not be given to an able-bodied widow with one child (Circular Letter, 2nd December 1871).

6th. Where such person shall be confined in any gaol or place of safe custody, subject always to the regulations contained in Art. 4 (*infra*).

7th. Where such person shall be the wife or child of any able-bodied man who shall be in the service of Her Majesty as a soldier, sailor, or marine.



With reference to the relief of the families of men serving in the militia, the Poor Law Board in 1854 expressed the following opinion:—

No doubt the men are bound to support their wives and families out of their pay or means, so far as these can be made available for the purpose. The material consideration for the guardians, therefore, seems to be whether or not the pay which a militiaman while on duty receives is sufficient, after providing for his own wants and such necessary expenses as the proper discharge of his public duties entail upon him, to support his family. If it be not sufficient, the Board consider that the guardians cannot properly refuse, when application for relief is made by the wife, to grant such relief as the actual necessities of the family may, in the opinion of the guardians, render needful. . . . It is in the discretion of the guardians to grant out-door relief if they think it desirable to do so. As to soldier, see *ante*, p. 170.

8th. Where any able-bodied person, not being a soldier, sailor, or marine, shall not reside within the union, but the wife, child, or children of such person shall reside within the same, the board of guardians of the union, according to their discretion, may, subject to the regulation contained in Art. 4, afford relief in the workhouse to such wife, child, or children, or may allow out-door relief for any such child or children being within the age of nurture, and resident with the mother within the union.

This provides for the case of a wife whose husband is absent from her either by desertion or otherwise, and is necessary in consequence of the law applicable to women thus situated. It had been held that in such cases relief to the children was not relief to the wife; consequently, the wife could not be compelled to come with her children into the workhouse, although a new provision has been made by the Poor Law Amendment Act, 1844 (7 & 8 Vict. c. 101, s. 25), in respect of certain women separated from their husbands. If, however, under any circumstances, she requires relief for herself, the guardians may require her to receive it in the workhouse, whether she do or do not come into the workhouse. As regards, however, children under the age of nurture, who may be living with the mother, the guardians cannot remove them from her; so that if she requires relief for them, and them only, the guardians must, except in the case provided for by Art. 4, give out-door relief, if relief be necessary (Inst. Letter, 21st December 1844). The age of nurture here referred to is seven years. Such a child cannot be removed from its parent, though it may have a different settlement and though the parent consent (*R. v. Birmingham*, 1843, 13 L. J. M. C. 1; 7 J. P. 705). When the mother of such a child is removed, the child must be removed with her. If the order of removal include the name of the child, it should be careful not to adjudge the child's settlement.

By the 4 & 5 Will. IV. c. 76, s. 56, the relief given to or on account of the wife, or to or on account of any child or children under the age of sixteen, not being blind, or deaf and dumb, shall be considered as given to the husband of such wife or to the father of such children, as the case may be. By the 57th section of the same Act, every man who shall marry a woman having a child or children at the time of such marriage, whether such child or children be legitimate or illegitimate, shall be liable to maintain such child or children as a part of his family, and shall be chargeable with all relief, or the cost price thereof, granted to, or on account of, such child or children, until such child or children shall respectively attain the age of sixteen, or until the death of the mother; and such child or children shall be deemed a part of the husband's family.

By Art. 2, in every case in which out-door relief shall be given on account of sickness, accident, or infirmity to any able-bodied male person resident within any of the said unions, or to any member of the family of any able-bodied male person, an extract from the medical officer's weekly



report (if any such officer shall have attended the case), stating the nature of such sickness, accident, or infirmity, shall be specially entered into the minutes of the proceedings of the board of guardians of the day on which the relief is ordered or subsequently allowed. But if the board of guardians shall think fit, a certificate under the hand of a medical officer of the union, or of the medical practitioner in attendance on the party, shall be laid before the board, stating the nature of such sickness, accident, or infirmity, and a copy of the same shall be in like manner entered in the minutes.

By Art. 3, no relief shall be given from the poor rates of any parish comprised in any of the said unions to any person who does not reside in some place within the union, save and except in the following cases:—

1st. Where such person, being casually within such parish, shall become destitute.

It is the duty of the guardians to relieve persons so situated without reference to the place of their settlement or residence (Instructional Letter, 21st December 1844).

2nd. Where such person shall require relief on account of any sickness, accident, or bodily or mental infirmity affecting such person, or any of his or her family.

3rd. Where such person shall be entitled to receive relief from any parish in which he or she may not be resident, under any order which justices may by law be authorised to make.

This exception is intended expressly to except from the operation of the Order the cases of relief given to non-resident lunatics in asylums under orders of justices and to persons under orders of removal (Instructional Letter, 21st December 1884).

4th. Where such person, being a widow, shall be in the first six months of her widowhood.

This exception is similar to the fourth exception to Art. 1, the reasons for which are stated in the note to the exception. With reference to this exception, it is necessary to bear in mind the provisions of the 9 & 10 Vict. c. 66, s. 2, which makes a widow irremovable, and, consequently, chargeable to the union in which she is residing for one year after her husband's death, provided she was living with him at the time of his death, and has not afterwards changed her residence. In such a case the guardians cannot lawfully grant non-resident relief, and the statute consequently overrides this exception. The case of a person who is a widow in a constructive sense, under the 7 & 8 Vict. c. 101, s. 25, does not come within this exception. The exception refers to the husband's death, and, therefore, it applies only to those who are widows in fact.

5th. Where such person is a widow, who has a legitimate child dependent on her for support, and no illegitimate child born after the commencement of her widowhood, and who at the time of her husband's death was resident with him in some place other than the parish of her legal settlement, and not situated in the union in which such parish may be comprised.

By the 7 & 8 Vict. c. 101, s. 26, "in the same case of any person being a widow having a legitimate child dependent on her for support, and no illegitimate child born after the commencement of her widowhood, and who at the time of her husband's death was resident with him in some place other than the parish of her legal settlement, and not situated in any union in which such parish is comprised, it shall be lawful for the guardians of such parish or union, if they see fit, to grant relief to such widow, although



not residing in such union or parish." Upon this the Poor Law Commissioners, in a circular dated the 17th October 1844, observe:—

That the widow must have been resident with her husband at the time of his death, not only out of the parish of her settlement, but also out of the union in which that parish may be comprised. The object of the clause appears to be to avoid the disturbance of those connections and mode of life at a distance from the union to which the family may have been accustomed, and which existed at the time of the husband's death. Where all the conditions exist which would enable the guardians to grant non-resident relief, they are still to use their discretion as to whether non-resident relief to the widow is in each particular case desirable. The general objection to such relief, such as the difficulty of ascertaining the circumstances of paupers beyond the power of inspection of the guardians or their officers, and the further difficulties attendant on the transmission of relief to places where the guardians have no authority and no official agency, will be weighed by the guardians. It must be borne in mind by guardians and their officers, that they are in no wise exempted from their previous obligation to relieve any widow who may be in the parish or union requiring relief by the power thus given to the guardians of the place of her settlement to afford her non-resident relief. And even when that power is exerted, if, notwithstanding the relief sent to her by her parish, she or her children require additional or further relief, the officers of the place where she is are still bound, as heretofore, to afford her the relief which the circumstances require.

6th. Where such person shall be a child under the age of sixteen maintained in a workhouse or establishment for the education of pauper children not situate within the union.

This removes the restriction upon the guardians from sending children to a workhouse or establishment for the training of pauper children which may be situated out of their union, where, but for the prohibition of relief to non-residence contained in the Order, they might lawfully do so.

This exception in Art. 3 also applies to children sent to certified establishments for the instruction of the blind, deaf, dumb, lame, deformed, or idiotic persons.

7th. Where such person shall be the wife or child, residing within the union, of some person not able-bodied, and not residing within the union.

Guardians are thus enabled to relieve the resident family of a non-resident man, provided he is not able-bodied, without requiring them to come into the workhouse (Inst. Letter, 21st December 1844).

8th. Where such person shall have been in the receipt of relief from some parish in the union from which such person seeks relief, at some time within the twelve calendar months next preceding the date of that one of the several Orders hereinbefore recited, which was applicable to that union, being settled in such parish, and not being resident within the union at the time of the allowance of the relief.

This exception is practically spent.

Where the husband of any woman is beyond the seas, or in custody of the law, or in confinement in a licensed house or asylum as a lunatic or idiot, all relief which the guardians shall give to his wife, or her child or children, shall be given to such woman in the same manner and subject to the same conditions as if she were a widow (art. 4). This article was introduced in conformity with the provision contained in the 7 & 8 Vict. c. 101, s. 25, in regard to the relief of women separated from their husbands, in certain cases particularly specified, who are by that provision to be treated as widows in respect to relief to be afforded to them by guardians. In the circular letter of the 17th October 1844, on this subject, the Poor Law Commissioners remark:—

Married women, whose children required and received relief, were not, before the passing of this Act, liable to any conditions in respect of such relief, and could cast off their children, however well such women might be able to maintain their children, or



to contribute to their maintenance. Widows, on the other hand, were liable to the like conditions and consequences of relief afforded to themselves and their children, as the fathers of legitimate children are.

The present Act declares that while the husband of any woman is beyond the seas (that is, out of Great Britain), or in custody of the law, or in confinement in any licensed house or asylum as a lunatic or idiot, all relief given to the wife, or to her child or children, shall, notwithstanding her coverture, be given to her in the same manner and subject to the same conditions as if she were a widow (s. 25). And, again, "where widows are obliged to receive relief for their children within the union, or within the workhouse, these married women will be subject to the like conditions."

By the Divided Parishes and Poor Law Amendment Act, 1876, s. 18, it is provided that the provision contained in the Poor Law Amendment Act, 1844 (7 & 8 Vict. c. 101, s. 25), relating to relief, whereby relief to a woman whose husband appears to be beyond the seas is to be given to her in the same manner and subject to the same conditions as if she were a widow, is to apply to a married woman living separate from her husband. The effect of this article is to enable the guardians to exercise a discretion as to whether they will give in- or out-door relief in such cases, in like manner as they are empowered to do in the cases of widows. The guardians may, therefore, if they think fit, decline to relieve the wife and children, except in the workhouse, unless under the following circumstances:—Where the children are under the age of nurture, and relief is applied for on their account only, and the guardians are satisfied that the relief is required for them alone and not for the parent—in which case, as the guardians cannot legally separate the children from their mothers, the Poor Law Board apprehended that the guardians would be obliged to give out-door relief to the extent of the maintenance of such children (10 Off. Cir. 109). As to relief by a married woman, see p. 169.

It shall not be lawful for the guardians, or any of their officers, or for the overseer or overseers of any parish in the union, to pay, wholly or in part, the rent of the house or lodging of any pauper, or to apply any portion of the relief ordered to be given to any pauper in payment of any such rent, or to retain any portion of such relief for the purpose of directly or indirectly discharging such rent, in full or in part, for any such pauper. Provided always that nothing in this article contained shall apply to any shelter or temporary lodging, procured in any case of sudden and urgent necessity, or mental imbecility, or shall be taken to prevent the said guardians, in regulating the amount of relief to be afforded to any particular person, from considering the expenses to be incurred by such person in providing lodging (art. 5). This article is intended to prevent a practice which prevailed in some parts of the country, whereby the poor rates have been made a fund for the payment of rents directly to the landlords. In all cases where the pauper is so far destitute as to require a lodging, or the means of paying for one, if the guardians do not deem it expedient in the particular case to require the party to come into the workhouse, they should supply to the pauper the means of paying for such lodging.

Provided always that in case the guardians of any of the said unions depart in any particular instance from any of the regulations hereinbefore contained, and within fifteen days after such departure report the same, and the grounds thereof, to the (Local Government) Board, and the (Local Government) Board approve of such departure, then the relief granted in such particular instance shall, if otherwise lawful, not be deemed to be unlawful, or be subject to be disallowed (art. 6). As to the mode of



obtaining repayment of relief given to out-pensioners of Greenwich and Chelsea hospitals, and lunatic pensioners, see 19 Vict. c. 15, ss. 8, 9. Under sec. 8 of that Act the Secretary of War may agree with the guardians for the repayment to them out of the pension the amount of relief advanced to, or expended on, the pensioner's account, not exceeding, in any case where relief has been administered to the pensioner's wife, or one child only, whom he is bound to maintain, the amount of one-half; or where such relief has been administered to two or more such children, or the pensioner's wife, and one or more such child or children, the amount of two-thirds of his pension. If the pensioner and his family be relieved in the workhouse, the guardians have no legal right to, and cannot claim any larger amount of the pension than is equivalent to the actual cost of the paupers in the workhouse. They cannot claim more than the charge made in respect of each of the other inmates. Sec. 9 of the Act relates to lunatic pensioners who are chargeable to the poor rates.

No relief which may be contrary to any regulation in this Order shall be given by way of loan; and any relief which may be given to, or on account of any person above the age of twenty-one, or to his wife, or any part of his or her family under the age of sixteen, under Art. 1, or any of the exceptions thereto, or under any of the exceptions to Art. 3, or under Art. 4, or under the proviso in Art. 6, may, if the guardians think fit, be given by way of loan (art. 7). As to relief by way of loan, see p. 198.

The next Order with reference to the regulation of out-door relief is dated the 14th December 1852, and applies principally to urban unions, and to a few unions which had not at that time provided adequate workhouse accommodation.

Whenever the guardians allow relief to any able-bodied male person out of the workhouse, one-half at least of the relief so allowed shall be given in articles of food or fuel, or in other articles of absolute necessity (art. 1).

In any case in which the guardians allow relief for a longer period than one week to an indigent poor person resident within their union or parish respectively, without requiring that such person shall be received into the workhouse, such relief shall be given or administered weekly, or at such more frequent periods as they may deem expedient (art. 2). The object of the Board in this article was mainly to save poor persons in the receipt of relief from being exposed to the temptation of expending at once money given to them beyond their present necessities (Inst. Letter, 25th August 1852).

Out-door relief should be granted for a fixed period only. The period should not in any case exceed three months. All orders to able-bodied men for relief in the labour yard should be given only from week to week (First Annual Report, Local Government Board, p. 63).

By Art. 3, it shall not be lawful for the guardians or their officers—

To establish any applicant for relief in trade or business;

Nor to redeem from pawn, or for any such applicant any tools, implements, or other articles;

Nor to purchase and give to such applicant any tools, implements, or other articles, except articles of clothing or bedding, where urgently needed, and such articles as are hereinbefore referred to in Art. 1;

Nor to pay, directly or indirectly, the expenses of the conveyance of any poor person, unless conveyed under the provisions of some statute, or under an order of justices or other lawful authority, or in conformity



with some order or regulation of the (Local Government) Board, except in the following cases, viz. :—

- 1st. The case of a person conveyed to or from a district school, or an hospital or infirmary, or a lunatic asylum, or a house licensed or hospital registered for the reception of lunatics ;
- 2nd. The case of a person conveyed to the workhouse of the union or parish in which such person is at the time chargeable ;
- 3rd. The case of a person conveyed to or from any other workhouse, or other house or establishment for the reception of poor persons, in which, for the time being, it shall be lawful for the guardians to place such person ;

Nor to give money to or on account of any such applicant for the purpose of effecting any of the objects in this article mentioned ;

Nor to pay wholly or in part the rent of the house or lodging of any pauper, nor to apply any portion of the relief ordered to be given to any pauper in payment of any such rent, nor to retain any portion of such relief for the purpose of directly or indirectly discharging such rent, in full or in part, for any such pauper :

Provided always that nothing in this article contained shall apply to any shelter or temporary lodging procured for a poor person in any case of sudden or urgent necessity or mental imbecility.

By Art. 4, no relief shall be given from the poor rates of any of the said parishes, or of any parish comprised in any of the said unions, to any person who does not reside in some place within such parish or union respectively, save and except in the following cases :—

- 1st. The case of a person casually within such parish and destitute ;
- 2nd. The case of a person requiring relief on account of any sickness, accident, or bodily or mental infirmity affecting him or her or any of his or her family.

The guardians may send sick, insane, or injured persons to establishments out of the union or parish intended for the treatment of their respective infirmities, as hospitals for the sick, asylums for the insane, and schools for the blind or deaf or dumb. It is not material whether the infirmity be of a permanent or of a temporary character ; the case will be within the exception so long as the infirmity continues, whatever may be the probability of its longer or shorter duration. Such a degree of old age as to produce a physical debility would be within the exception, and so would blindness. It should be observed that, in cases of accident, it is provided by the Poor Law Amendment Act, 1848, s. 2, that where the party is not at the time of the accident in receipt of relief from the union or parish where the accident happens, the charge must be ultimately borne by the guardians of the union or parish where he has a fixed place of abode ; but the guardians of the union or parish where the accident happens are not thereby relieved from their liability at common law to provide medical assistance in the first instance.

- 3rd. The case of a widow having a legitimate child dependent on her for support, and no illegitimate child born after the commencement of her widowhood, and who at the time of her husband's death was resident with him in some place other than the parish of her legal settlement, and not situated in the union in which such parish is comprised ;
- 4th. The case of a child under the age of sixteen maintained in a workhouse or establishment for the education of poor children not situate within the union or parish ;
- 5th. The case of the wife or child residing within such parish or union of some person not residing therein ;



6th. The case of a person who has been in receipt of relief from such parish, or from some parish in the union from which he or she seeks relief, at some time within the twelve calendar months not preceding the date of this Order.

No relief shall be given to any able-bodied male person while he is employed for wages or other hire or remuneration by any person (art. 5). Every able-bodied male person, if relieved out of the workhouse, shall be set to work by the guardians, and be kept employed under their direction and superintendence so long as he continues to receive relief (art. 6). With regard to the steps taken in times of exceptional distress, the following remarks of the Local Government Board (Circ. Letter, 15th March 1886) may be found useful:—"The spirit of independence which leads so many of the working classes to make great personal sacrifices rather than incur the stigma of pauperism, is one which deserves the greatest sympathy and respect, and which it is the duty and interest of the community to maintain by all the means at its disposal. Any relaxation of the general rule at present obtaining, which requires as a condition of relief to able-bodied male persons, on the ground of their being out of employment, the acceptance of an order for admission to the workhouse or the performance of an adequate task of work as a labour test, would be most disastrous, as tending directly to restore the condition of things which, before the reform of the poor laws, destroyed the independence of the labouring classes and increased the poor rate until it became an almost insupportable burden. It is not desirable that the working classes should be familiarised with poor law relief, and if once the honourable sentiment which now leads them to avoid it is broken down, it is probable that recourse will be had to this provision on the slightest occasion. The Local Government Board have no doubt that the powers which the guardians possess are fully sufficient to enable them to deal with ordinary pauperism, and to meet the demand for relief from the classes who usually seek it. When the workhouse is full, or when the circumstances are so exceptional that it is desirable to give out-door relief to the able-bodied poor on the ground of want of work, the guardians in the unions which are the great centres of population are authorised to provide a labour test, on the performance of which grants in money and kind may be made according to the discretion of the guardians. In other unions where the guardians have not already this power, the necessary order is issued whenever the circumstances appear to require it.

"But these provisions do not in all cases meet the emergency. The labour test is usually stone-breaking or oakum-picking. This work, which is selected as offering the least competition with other labour, presses hardly upon skilled artisans, and, in some cases, their proficiency in their special trades may be prejudiced by such employment. Spade husbandry is less open to objection, and when facilities offer for adopting work of this character as a labour test, the Board will be glad to assist the guardians by authorising the hiring of land for the purpose, when this is necessary. In any case, however, the receipt of relief from the guardians, although accompanied by a task of work, entails the disqualification which by statute attaches to pauperism. What is required in the endeavour to relieve artisans and others who have hitherto avoided poor law assistance, and who are temporarily deprived of employment, is—

- "1. Work which will not involve the stigma of pauperism ;
- "2. Work which all can perform, whatever may have been their previous vocations ;
- "3. Work which does not compete with that of other labourers at present in employment ;



“And, lastly, work which is not likely to interfere with the resumption of regular employment in their own trades by those who seek it.

“The Board have no power to enforce the adoption of any particular proposals, and the object of this circular is to bring the subject generally under the notice of boards of guardians and other local authorities. In districts in which exceptional distress prevails, the Board recommend that the guardians should confer with the local authorities, and endeavour to arrange with the latter for the execution of works on which unskilled labour may be immediately employed.

“These works may be of the following kinds among others:—

- “(a) Spade husbandry on sewage farms ;
- “(b) Laying out of open spaces, recreation grounds, new cemeteries, or disused burial-grounds ;
- “(c) Cleansing streets not usually undertaken by local authorities ;
- “(d) Laying out and paving new streets, etc. ;
- “(e) Paving of unpaved streets, and making of footpaths in country roads ;
- “(f) Providing or extending sewerage works, and works of water supply.

“It may be observed that spade labour is a class of work which has special advantages in the case of able-bodied persons out of employment. Every able-bodied man can dig, although some can do more than others ; and it is a work which is in no way degrading, and need not interfere with existing employment. In all cases in which special works are undertaken to meet exceptional distress, it would appear to be necessary : 1st, that the men employed should be engaged on the recommendation of the guardians as persons whom, owing to previous condition and circumstances, it is undesirable to send to the workhouse or to treat as subjects for pauper relief ; and 2nd, that the wages paid should be something less than the wages ordinarily paid for similar work, in order to prevent imposture and to have the strongest temptation to those who avail themselves of this opportunity to return as soon as possible to their previous occupations. When the works are of such a character that the expenses may properly be defrayed out of borrowed moneys, the local authorities may rely that there will be every desire on the part of the Board to deal promptly with the application for their sanction to a loan.”

On the 14th November 1892 another circular letter was issued on the subject of Pauperism and Distress, there being at that time a considerable amount of distress in different parts of the country occasioned by scarcity of employment. In the letter the President of the Local Government Board remarked:—

I would urge on the local authorities on whom devolves the duty of carrying out the works required for their districts, that the execution of such works should, whenever practicable, be commenced at an early date, so that employment may be given during the winter months, when work is the more needed, rather than later in the coming year.

I would at the same time emphasise the great importance which I attach to the co-operation of boards of guardians with local authorities, in order that the pauperisation of those persons whose difficulties are occasioned only by exceptional circumstances arising from temporary scarcity of employment, and who are unwilling to become dependent on poor law relief, may, as far as practicable, be avoided. In the case of the metropolis, some of the classes of employment suggested above are not practicable ; but, apart from the execution of new works, it will probably be found that in the performance of the ordinary routine duties of the sanitary authority occasions will arise when surplus labour may be profitably utilised.

By Art. 7, provided that the regulations in Arts. 5 and 6 shall not be imperative in the following cases:—

- 1st. The case of a person receiving relief on account of sudden and urgent necessity ;
- 2nd. The case of a person receiving relief on account of any sickness, accident, or bodily or mental infirmity affecting such person or any of his family.



With regard to relief to members of sick benefit societies, in the opinion of the Poor Law Board the guardians were not justified, according to the strict law applicable to such cases, in giving any further relief than such an amount as would, together with the sum that the person was receiving from the benefit society, render the amount of such person's weekly income equal, and no more than equal, to that amount which the guardians hold to be necessary to relieve the destitution of a person similarly circumstanced, but who has no other means of support.

- 3rd. The case of a person receiving relief for the purpose of defraying the expenses of the burial of any of his family ;
- 4th. The case of the wife, child, or children of a person confined in any gaol or place of safe custody ;
- 5th. The case of the wife, child, or children resident within the parish or union of a person not residing therein.

The guardians shall, within thirty days after they shall have proceeded to act in execution of Art. 6, report to the (Local Government) Board the place or places at which able-bodied male paupers shall be set to work, the sort or sorts of work in which they or any of them shall be employed, the times and mode of work, and the provision made for superintending them while working ; and shall forthwith discontinue or alter the same if the (Local Government) Board shall so require (art. 8).

No relief which shall be contrary to any regulation in this Order shall be given by way of loan ; but any relief which may be given in conformity with the provisions of this Order to or on account of any person to whom relief may be lawfully given above the age of twenty-one, or to his wife or any part of his or her family under the age of sixteen, may, if the guardians shall think fit, be given by way of loan (art. 9). When relief is given by way of loan and the loan is not repaid, the guardians may recover the amount before two justices (4 & 5 Will. IV. c. 76, s. 59), or in the County Court or other Court for the recovery of small debts for the district wherein the union or major part thereof is comprised (11 & 12 Vict. c. 110, s. 8 (see p. 198)).

If the guardians shall, upon consideration of the special circumstances of any particular case, deem it expedient to depart from any of the regulations hereinbefore contained (except those contained in Art. 3, p. 191), and within twenty-one days after such departure shall report the same and the grounds thereof to the (Local Government) Board, the relief which may have been so given in such case by such guardians before an answer to such report shall have been returned by the said Board shall not be deemed to be contrary to the provisions of this Order ; and if the (Local Government) Board shall approve of such departure, and shall notify such approval to the guardians, all relief given in such case after such notification, so far as the same shall be in accordance with the terms and conditions of such approval, shall be lawful, anything in this Order to the contrary notwithstanding (art. 10). In connection with the administration of out-door relief, it is desirable to draw attention to the circular upon that subject issued by the Poor Law Board on the 9th December 1868, in which, after reciting a lax practice existing in many unions in the administration of out-door relief, the Board state that in many cases it appears that no definite time or place is fixed by the guardians for the distribution of out-door relief in each parish, but that the relieving officers are left to make their own arrangements, not necessarily even reporting them to the guardians. In certain instances there are not more than one or two relief stations for the whole of the parishes of a union ; in certain



others, relief in kind is regularly given by means of tickets upon shopkeepers, a course which, though in certain cases (as where orders for relief commended by the medical officer are given), perhaps occasionally unavoidable, is, when adopted as a general rule, obviously injurious to the real interest of the poor man, as exposing him to the danger of being supplied with inferior articles at extortionate prices, or to the temptation of changing away his order for money, to the possible injury to his family. The Board find that in comparatively few instances the relieving officers are supplied with weights and scales, and that the guardians and the poor are thus deprived of proper security that the applicant really receives the full amount of relief which the guardians intended for him. The Board think it the more important to call attention to this point from the circumstance that in one county several bakers have lately been prosecuted by the police, and convicted of giving short weight, thus defrauding both the ratepayers and the poor. With a view to remedy the above-mentioned evils and deficiencies, the Board recommend that guardians, as a general rule, appoint some one or more places in each parish (not being, for obvious reasons, either a public-house or a shop) at which, at a time fixed by them and duly made public, it shall be the duty of the relieving officer to attend, for the purpose of administering out relief. Such an arrangement will at once enable the guardians to exercise due control over the relief arrangements, will render attendance for the receipt as little burdensome as possible to the poor, and will afford due facilities for applications. The appointment, however, of a station, at which the paupers who are able to do so may attend to receive their relief, should not render the relieving officer unmindful of the important duty imposed upon him by the regulations of the Board of visiting the house of any applicant for relief, and also of visiting from time to time all paupers receiving relief, and making due inquiries into the existing circumstances of each case. Nor will the relieving officer be exonerated from the duty of administering the requisite relief at the houses of paupers, who may be wholly incapable, from infirmity of body, of attending at the station, and may have no means of sending for their relief. The Board do not doubt that, in the great majority of instances, the duty of administering out relief is discharged by relieving officers with care and fidelity, but they think that the system already in operation in many cases, of which they now recommend the universal adoption, will afford a more effectual and permanent security against neglect. To this end, they further strongly advise guardians to require their relieving officers to keep a diary, as is already done in some unions, to be laid before the guardians at each meeting, stating shortly their times of arrival at and departure from each relief station, the name and residence of each pauper visited at his or her own home on each day, and such particulars as, without imposing unnecessary labour on relieving officers, they may deem requisite.

The Board append to the circular, for the information of guardians, a form already in use in some unions. The Board further recommend that, in all cases where practicable, proper weights and scales should be kept at each out relief station, and the use of them, so far as is necessary to check imposition, be made obligatory upon the relieving officer. The Board have reason to believe that in several parts of the country the giving relief in kind is materially, if not wholly, discontinued. They do not refer to cases of able-bodied persons receiving relief under the out-door labour test order, in which the giving of more than half of the relief in money is illegal, but to those cases also (and they are not few in number) in which, it



being competent for guardians to give relief in either form, the whole is (perhaps from consideration of convenience to the relieving officers or on other grounds) given wholly in money. The Local Government Board, in a Circular Letter of the 2nd December 1871, also adverted to some considerations which ought to be borne in mind by the guardians in the administration of out-door relief. The most important, in the opinion of the Board, is the application of an efficient workhouse test to all able-bodied applicants for relief, whether male or female, and the most strict and careful inquiries into the destitution and circumstances of all paupers to whom out-door relief is granted at their own homes. The Board desired the following recommendations to be brought under the notice of the guardians:—

1. That out-door relief should not be granted to single able-bodied men or to single able-bodied women, either with or without illegitimate children.
2. That out-door relief should not, except in special cases, be granted to any woman deserted by her husband during the first twelve months after the desertion, or to any able-bodied widow with one child only.
3. That in the case of any able-bodied widow with more than one child it may be desirable to take one or more of the children into the workhouse in preference to giving out-door relief.
4. That in unions where the prohibitory order is in force, the workhouse test should be strictly applied ; and the guardians should be informed that the Board will not be prepared to sanction any cases which are not reported within the time limited by the Order, and in which the reports do not contain a detailed statement of the paupers to which they refer, showing the number of their respective families, with the ages and number of children employed, amount of wages of the several members of the family at work, cause of destitution, period during which they have been without employment, amount of relief, if any, given previously to the transmission of the report, and what extent of accommodation for all classes exists in the workhouse at the time.
5. That out-door relief should be granted for a fixed period only, which should not in any case exceed three months.
6. That all orders to able-bodied men for relief in the labour yard should only be given from week to week.
7. That out-door relief should not be granted in any case, unless the relieving officer has, since the application, visited the home of the applicant, and has recorded the date of such visit in the Relief Application and Report Book. Cases in which the relieving officer has not had time to visit should be relieved by him in kind only, or by an order for the workhouse.
8. That the relieving officer should be required to make at least fortnightly visits to the homes of all persons receiving relief on account of temporary sickness, and of able-bodied men receiving relief in the labour yard, and to visit the old and infirm cases at least once a quarter ; and the relieving officer should be required to keep a diary with the dates and results of such visits.
9. That the provisions with respect to the compulsory maintenance of paupers by relatives legally liable to contribute to their support should be more generally acted upon.
10. That as the recommendations of medical officers for meat and stimulants are regarded as equivalent to orders for additional relief, they should in all cases be accompanied by a report from the medical officer in a prescribed form, setting forth the particulars of each case ascertained by personal inquiry.
11. That in the most populous unions it may be expedient to appoint one or more officers, to be termed "inspectors of out-relief," whose duty it would be to act as a check upon the relieving officers, and ascertain also the circumstances connected with the recipients of relief ; such appointments have already been tried in Liverpool, and found to answer very successfully.

*The Supplemental Labour Test Order.*—In unions in which the General Prohibitory Order of 21st December 1844 is in force, the Poor Law Commissioners and the Poor Law Board, when the workhouses of those unions have been full, or when there has been an unusual pressure of able-bodied poor for relief, have issued a supplemental out-door labour test order,



which, however, it must be borne in mind, is subsidiary to, and not in substitution of, the General Prohibitory Order.

The 4 & 5 Will. iv. c. 76, s. 28, enables the guardians to provide "utensils, materials for setting the poor on work" in the union, and also authorises the charging the cost and expenses as incurred to the common fund of the union.

As regards the enforcement of a task of work for poor persons relieved out of the workhouse, see 29 & 30 Vict. c. 113, s. 15.

*Medical Relief to Permanent Paupers.*—By Art. 75 of the Consolidated Order it is provided that the guardians shall, once at least in every year, cause to be prepared by the clerk or relieving officer a list of all such aged and infirm persons, and persons permanently sick or disabled, as may be actually receiving relief from such guardians, and residing within the district of each medical officer of the union, and shall from time to time furnish to each district medical officer a copy of the list aforesaid. By Art. 76, every person whose name is inserted in such list shall receive a ticket, and shall be entitled, on the exhibition of such ticket to the medical officer of his district, to obtain such advice, attendance, and medicines as his case may require, in the same manner as if he had received an order from the guardians; and such ticket shall remain in force for the time specified therein, unless such person shall cease to be in receipt of relief before the expiration of such time. These articles are intended to facilitate the obtaining of attendance and medicines by the permanent paupers,—a class whose destitution is acknowledged, and which necessarily includes the most helpless portion of the community.

*Relief by way of Loan.*—Provision is made by the 4 & 5 Will. iv. c. 76, s. 58, for declaring any relief, or the cost price thereof, given to any poor person above the age of twenty-one, or to his wife, or to any of his children under sixteen, to be on loan. The guardians may not give relief on loan in cases where they may not give out-door relief; but, subject to this, they may, if they think fit, give relief by way of loan. Relief on loan may be recovered before the justices, who have power to summon the pauper's master before them, and make an order on him to pay to the guardians any relief given on loan to the pauper out of any wages due to him (4 & 5 Will. iv. c. 76, s. 59). Relief on loan can also be recovered in the County Court (11 & 12 Vict. c. 110, s. 8). The consent of the pauper is not necessary to enable the guardians to give relief on loan, and therefore it is no answer to a claim by them that the pauper did not consent to the loan (4 & 5 Will. iv. c. 76, s. 58).

*Recovery of Relief from Paupers.*—When any pauper shall have in his possession or belonging to him any money, or valuable security for money, the guardians of the union or parish to which he is chargeable may take and appropriate so much of it, or recover the same as debt before any local Court, as will reimburse them for the amount paid by them in relieving the pauper during the previous twelve months (12 & 13 Vict. c. 103, s. 16). In the event of a pauper dying possessed of any property, the guardians may reimburse themselves the cost of his burial and his maintenance for the past twelve months (*ibid.*). If there are other creditors, and the estate is insufficient, the guardians will rank as ordinary creditors (*Laver v. Botham*, [1895] 1 Q. B. 59). By the 39 & 40 Vict. c. 61, s. 23, where any pauper shall be entitled to any annuity or periodical payment, the trustee or other person bound to make payment of the same may from time to time pay to the guardians the cost of the relief of the pauper since the last instalment became due. Where the guardians incur any expenses in the relief of a



pauper lunatic, being the member of a benefit or friendly society, whether registered or not (*Merthyr Tydvil Guardians v. Cambrian Lodge*, 1881, 45 J. P. 220), and as such entitled to receive any payment, they may recover from him as a debt, or from his executors in the case of death, the sum so expended (*ibid.*). Where the trustee, manager, or other person declines to make the payment, the guardians may apply to the justices for an order that the requisite amount should be paid at once (*ibid.*). But where the pauper's right to the annuity or payment is disputed, the justices have no power to hear and determine the matter (*R. v. Richardson*, [1894] 2 Q. B. 323). The above section does not apply, however, unless the relief was given on loan (*ibid.*).

*Apprenticeship of Pauper Children.*—Sec. 12 of the 7 & 8 Vict. c. 101 transfers the power hitherto possessed by the overseers of apprenticing pauper children to the guardians, except in the case of apprenticing to the sea service. The same section empowered the Poor Law Commissioners to prescribe the duties of the masters to whom poor children may be apprenticed, and the terms and conditions to be inserted in the indentures; and enacts that every master who wilfully refuses or neglects to comply with such terms or conditions shall, upon conviction before two justices, be liable to a penalty not exceeding £20. The guardians are required to keep a register of apprentices bound by them (42 Geo. III. c. 46, s. 1), and also of every young person taken as a servant from the workhouse (14 Vict. c. 11, s. 3). Apprentices and servants are to be visited once a year (*ibid.* ss. 4, 5). By the 39 & 40 Vict. c. 61, s. 33, the guardians may appoint an officer for this purpose. Art. 52 of the General Order, 24th July 1847, provides that no child under the age of nine years, and no child (other than a deaf and dumb child) who cannot read and write, shall be bound apprentice by the guardians. Art. 53 forbids the binding of a child to a person who is not a housekeeper or assessed to the poor rate in his own name, or to a journeyman, to a person under twenty-one years of age, or to a married woman. Sec. 3 of the 3 & 4 Vict. c. 85 prohibits the binding of a child under sixteen to a chimney-sweep. No premium, other than clothing for the apprentice, may be given where the person bound is over sixteen, unless he is maimed, deformed, or suffering from some permanent infirmity, such as may render him unfit for certain trades or sorts of work. But before they pay the premium the guardians must obtain a doctor's certificate to this effect, which must be entered on their minutes (Order 24, July 1847). No apprentice is to be bound for more than eight years (*ibid.* art. 56). No person over fourteen can be bound without his consent, and if under sixteen, without the consent of his father, or, if a bastard, of his mother (*ibid.* art. 57). Unless the Local Government Board specially permit it, a child must not be apprenticed more than thirty miles from where it is residing at the time (*ibid.* art. 58). Before a child under fourteen may be bound, the medical officer must certify as to his fitness, having regard to his health and strength (*ibid.* art. 59).

The apprenticeship of boys to the sea service by guardians is regulated by the Merchant Shipping Act, 1894 (58 Vict. c. 60). Sec. 107 provides that the indenture shall be executed in the presence of, and attested by, two justices of the peace, who shall ascertain that the boy has consented to be bound, and has attained the age of twelve years, and is of sufficient health and strength, and that the master is a proper person for the purpose.

Sec. 28 of the 39 & 40 Vict. c. 61 enables the guardians to pay the expenses of sending any boy who is, or whose parents are, in receipt of



relief, and who is desirous of joining the Royal Navy, to any port or place in the United Kingdom for examination.

*Boarding out of Pauper Children.*—Guardians have power to board out children in homes, both within and beyond the limits of their union. Their powers in this respect are regulated by two Orders of the Local Government Board, each dated 28th May 1889, which deal with boarding out within and without the limits of a union respectively.

*Burial of Paupers.*—The guardians may bury the body of any poor person which may be within their union (7 & 8 Vict. c. 101, s. 31). But they are not bound to do so. The legal obligation to bury a dead body is on the occupier of the premises in which the death occurred (*R. v. Stewart*, 1840, 12 Ad. & E. 773; 10 L. J. M. C. 40; *R. v. Price*, 1883, 12 Q. B. D. 247). If the guardians bury the body, they may recover the cost out of any property belonging to the pauper (12 & 13 Vict. c. 103, s. 16; *Laver v. Botham & Sons*, [1895] 1 Q. B. 59). The guardians bury a pauper dying outside the union and pay the costs, and recover the same from the parties (if any) from whom they could recover the cost of relief to the pauper (*ibid.* s. 17). If the parish burial-ground is closed or overcrowded, the guardians may bury in the neighbouring parish, and may enter into agreements for the burial of the bodies of poor persons (18 & 19 Vict. c. 79, ss. 1, 2).

*Deaf and Dumb Persons.*—Guardians may provide for the education of pauper children in certified schools for the instruction of blind, deaf, dumb, lame, deformed, or idiotic persons (25 & 26 Vict. c. 43). Guardians have no power to send blind or deaf children to school, other than idiots or imbeciles, or those children resident in a workhouse, or in an institution to which they have been sent by a board of guardians from a workhouse, or boarded out by guardians. The Elementary Education (Blind and Deaf Children) Act, 1893, makes provision for the education of blind and deaf children not included in the above exceptions. Guardians may also provide for the reception and maintenance and instruction of adult blind, deaf, or dumb paupers in any institution established for the purpose (30 & 31 Vict. c. 106, s. 21). The 31 & 32 Vict. c. 122, s. 13, enables guardians to pay the cost of idiots sent to asylums.

*Emigration of Poor Persons.*—The guardians of unions and separate parishes can expend money in the emigration of any poor person residing therein, whether actually in receipt of relief or not, with the exception of the case of orphan or deserted children under sixteen years of age, who must be chargeable. The statutes authorising this are the 4 & 5 Will. iv. c. 76, s. 62; 7 & 8 Vict. c. 101, s. 29; 12 & 13 Vict. c. 103, s. 20; and 13 & 14 Vict. c. 101, s. 4. The Legislative Assemblies of Ontario and Manitoba have recently passed special Acts regulating the emigration of dependent children to those provinces (see 62 J. P. 74, 298).

*Payment of School Fees.*—By sec. 10 of the Elementary Education Act, 1876, the guardians are required to pay the school fees, not exceeding three-pence per child per week, of children whose parents are not paupers, and apply to the guardians to do so, where they are satisfied of the parents' inability to pay them. Such payments do not amount to relief so as to disqualify the parent in the manner poor relief otherwise does. Sec. 40 of the same statute enables the guardians to make it a condition of relief out of the workhouse that the recipient send his child to a public elementary school, unless such child shall have passed the Third Standard of the Code of 1876. When a child is sent to a certified day industrial school, and the parent ordered to maintain it, the parent may, if unable to pay the sum



required by the order to be paid, apply to the guardians, who, if satisfied of his inability, are bound to give the parent sufficient relief to pay, or so much of it as they consider him unable to pay (39 & 40 Vict. c. 79, s. 16 (3)).

*Pauper Lunatics.*—Where a pauper lunatic is sent to an asylum, or where an inmate of an asylum becomes a pauper, he is to be deemed chargeable to the union from which he was sent, until it is established that he is settled in some other union (53 & 54 Vict. c. 5, s. 286; 54 & 55 Vict. c. 65, s. 19). Orders for the maintenance of pauper lunatics may be made on the guardians by the justice who sent the lunatic to the asylum. The justices may also adjudge the settlement of the pauper, and order the union liable to pay the expenses of his maintenance, etc. (53 & 54 Vict. c. 5, ss. 287, 289). The guardians obtaining the order must send notice of it to the guardians of the union to which the lunatic is adjudged to be settled (*ibid.* s. 302). An appeal lies to Quarter Sessions against such an order (*ibid.* s. 303). The guardians may recover the costs of a lunatic's maintenance out of his estate (*ibid.* ss. 299, 300). Provision is made by sec. 24 (2) of the Local Government Act, 1888 (51 & 52 Vict. c. 41), for a contribution by the County Council in respect of the maintenance of pauper lunatics. See tit. ASYLUMS.

*Funds for the Relief of the Poor.*—By the Union Chargeability Act, 1865 (28 & 29 Vict. c. 79), it is directed that all the cost of relief to the poor, and the expenses of the burial of the poor by guardians, as well as expenses in connection with registration and vaccination, shall be charged upon the common fund of the union. By Art. 1 of the General Order, 26th February 1866, the clerk shall, as soon as convenient before the 25th day of March next, and thenceforth four weeks at least before the 29th day of September and the 25th day of March respectively in each year, estimate the probable amount of the expenditure in the relief of the poor, and other charges by the guardians on behalf of the union, as well as any separate expenditure chargeable against any parish therein during the then next ensuing half-year, and estimate the probable balance due to or from each parish at the end of the current half-year, and shall apportion the sums to be contributed by the several parishes comprised in the union, according to the law for the time being in force therein, and shall prepare the orders on the overseers or other proper authorities of the several parishes for the payment of such respective contributions, and of any such separate expenditure as aforesaid, and the orders so prepared shall be laid before the guardians for their consideration a reasonable time before the expiration of the current half-year. By Art. 2 the guardians shall make orders on the overseers or other proper authorities of every parish in the union, at the commencement of each half-year ending on the days above mentioned, and from time to time as occasion may arise, for the payment to the guardians of all such sums as may be required by them, as a contribution of the parish to the common fund of the union, and for any other expenses separately chargeable by the guardians in the parish; and in such orders the contributions shall be directed to be paid by one sum, or by instalments, on days to be specified in such orders, as to the guardians may seem fit. A form is prescribed for the order, which must be signed by the presiding chairman and two other guardians, and countersigned by the clerk.

The several parishes of the union are required to contribute to the common fund in proportion to the annual rateable value of the lands, tenements, and hereditaments in such parishes respectively assessable to the



poor rate (24 & 25 Vict. c. 55, s. 9). The basis of the contributions is fixed by the Union Assessment Committee Act, 1862 (25 & 26 Vict. c. 103, s. 20). By that section it is directed that when the assessment committee for any union shall have approved lists for all the parishes in the union, the contributions for the common fund shall be based upon the valuation lists lastly approved of for such parishes (see tit. ASSESSMENT COMMITTEE).

In case the contributions required from any parish should be in arrear, the guardians may proceed under sec. 1 of the 2 & 3 Vict. c. 84. This section empowers the justices, on the application of the guardians, to issue a warrant to cause the amount of contribution in arrear to be levied and recovered from the overseers, in the same way that a poor rate is recovered from a ratepayer in default; or the overseers may be fined for their neglect under sec. 98 of the 4 & 5 Will. IV. c. 76.

The treasurer of the union is required to report in writing to the Local Government Board whenever there are no funds in his hands belonging to the union (General Order, 24th July 1847, art. 203 (4)).

In connection with the making of contribution orders, it may be remarked that the guardians have no power to make a retrospective order, nor have overseers power to make a retrospective rate, and that therefore the guardians cannot raise money for the payment of old debts (*Waddington v. City of London Union*, 1858, 28 L. J. M. C. 113; 22 J. P. 755; *A.-G. v. Wilkinson*, 1859, 28 L. J. Ch. 392; 22 J. P. 211; see also *R. v. Leigh Rural District Council*, [1898] 1 Q. B. 836).

*Metropolitan Poor.*—In the metropolis further provision is made for the management of the poor by the Metropolitan Poor Act, 1867. This statute provides for the establishment of asylums for the reception of the sick, insane, or infirm poor chargeable to unions in the metropolis, of dispensaries for the poor, and for district schools for pauper children. The expenses of the Act are defrayed out of a common fund raised by contributions from the several unions, parishes, and places in the metropolis. For the purposes of the Act the metropolis is divided into districts, and for each district a body of managers is elected by the guardians of the several unions and parishes forming the district. Sec. 11 of the Metropolitan Poor Amendment Act, 1869, enables the managers of any asylum district to provide training ships for boys for the sea service, and the Poor Law Act, 1889, provides for the reception of diphtheria patients into the asylums provided by the managers for fever and smallpox patients. The statute has been amended by the 31 & 32 Vict. c. 122, ss. 9, 35; 32 & 33 Vict. c. 63, ss. 6, 9, 20; 33 & 34 Vict. c. 18; 34 & 35 Vict. c. 15; 38 & 39 Vict. c. 66; 40 Vict. c. 61, ss. 40, 41; 42 & 43 Vict. c. 6, s. 11; 53 & 54 Vict. c. 5, s. 342; 56 & 57 Vict. c. 73, s. 89; 60 & 61 Vict. c. 29, s. 3; and see also the Metropolitan General Orders of the Local Government Board.

#### SETTLEMENT AND REMOVAL OF THE POOR.

*Settlement and Removal generally.*—"By the term 'settlement' is to be understood a permanent indestructible right to take the benefit of the poor laws in a particular parish or place which maintains its own poor" (Gambier on *Par. Sett.* 1). A settlement is the right acquired in any one of the modes pointed out by the poor laws to become a recipient of the benefit of those laws, in that parish or place which provides for its own poor where the right has been last acquired. It is not forfeitable, and may be communicated from person to person (*R. v. St. Mary, Cardigan*, 1794, 6 T. R. 116). *Primâ facie* the place of a person's birth is his place of settlement (*R. v. Heaton*, 1796, 6 T. R. 653; 3 R. R. 302). But a birth settlement is only



*prima facie* and is liable to be defeated by proof of the settlement of the parents, or of a subsequently acquired settlement by the pauper. Thus, as a general rule, a child under the age of sixteen takes the settlement of its father or widowed mother, as the case may be, up to that age, and retains it until it acquires another (39 & 40 Vict. c. 61, s. 35). Similarly, an illegitimate child takes and retains the settlement of its mother (*ibid.*). The exception is where the parent's settlement was itself derivative, in which case children of either class, as soon as they attain the age of sixteen, are thrown upon their own birth settlement until they acquire another (see per Lord Watson in 14 App. Cas. at p. 484). A wife takes her husband's settlement on marriage, if he has one (*St. Giles, Reading v. Eversley, Blackwater*, 1724, 1 Stra. 580; 2 Raym. (Ld.) 1332; *R. v. Hinkworth*, 1778, Cald. 42; 1 Doug. 46 n.), and she cannot gain a settlement of her own whilst married (*R. v. Aythorpe, Rooding*, 1756, Burr. S. C. 412). A settlement may also be gained by residence, by being bound apprentice, by the renting of a tenement rated at not less than £10 a year, by payment of rates, or by owning an estate. It has been stated that having a settlement in a particular place gives a person a right to take the benefit of the poor laws in that place. But if a person becomes chargeable, the guardians may obtain an order for his removal to his place of settlement (14 Car. II. c. 12), unless the person has gained a "status of irremovability," in which case he cannot be removed (9 & 10 Vict. c. 66, s. 1), but must be relieved at the cost of the union in which the parish is from which he is irremovable. In practice therefore it is necessary, before inquiring into a pauper's settlement, to ascertain whether he has gained a status of irremovability. No person can be removed until he becomes actually chargeable to the poor rates (35 Geo. III. c. 101, s. 1). Provided that every person who shall have been convicted of larceny or any other felony, or who shall appear to two justices of the division in which he resides, upon the oath of two or more credible witnesses, to be a person of evil fame or a reputed thief, such person not being able to give a satisfactory account of himself, or who has been convicted as an idle and disorderly person, or as a rogue and a vagabond, shall be deemed to be a person actually chargeable and liable to be removed to the parish of his last legal settlement (*ibid.* s. 5; 5 Geo. IV. c. 83, s. 20).

*Persons Irremovable.*—The effect of the 9 & 10 Vict. c. 66, s. 1, as amended by the 24 & 25 Vict. c. 55, s. 1, and the 28 & 29 Vict. c. 79, s. 8, is that no person can be removed, nor may any warrant be granted for his removal, from any union in which he has resided for one year next before the application of the warrant. And in computing the above period of residence the time during which a person is a prisoner in a prison; serving Her Majesty as a soldier, marine, or sailor; residing as an in-pensioner in Greenwich or Chelsea hospitals; confined in a lunatic asylum or house duly licensed, or hospital registered for the reception of lunatics; a patient in a hospital; or during which any such person shall receive relief from any union or parish, or shall be wholly or partly maintained by any rate or subscription raised in a parish in which such person does not reside, not being a *bona fide* charitable gift, is to be excluded. But a removal to a lunatic asylum is not to be deemed a removal for the purposes of this section. Time spent by a child in an industrial school is also to be excluded in computing residence (29 & 30 Vict. c. 118, s. 31), and also the time during which a person is confined in a retreat for habitual drunkards (42 & 43 Vict. c. 19, s. 2). Residence as a widow will coalesce with residence as wife to complete the one year's residence to give a status of irremovability (*R. v. Glossop*, 1848, 12 Q. B. 117; 17 L. J. M. C. 171; 12 J. P. 597). A pauper is irre-



movable although his term of one year's residence is computed by the time in which he lived in two or more parishes of the union (*R. v. Bolton-le-Sands*, 1865, 35 L. J. M. C. 54; 12 Jur. N. S. 371; 13 L. T. N. S. 523); and this will be so although one of the parishes has been added to or separated from the union (31 & 32 Vict. c. 122, s. 34). But if a parish is divided under sec. 1 (3) of the Local Government Act, 1894, a status of irremovability gained in the undivided parish would be lost (*Dorking Union v. St. Saviour's Union*, 1897, 61 J. P. 708; 13 T. L. R. 558; 1898, W. N. 12 (5)). As to the meaning of the word "resided," it was said by Coleridge, J., in *Blackwell v. England*, 1857, 27 L. J. Q. B. 124, that under the Poor Law Acts "residence" means where the pauper sleeps. It may also be said to mean home or domicile (*Lambe v. Smythe*, 1846, 15 L. J. Ex. 287). But residence in a parish, to gain a status of irremovability need not be in a house. Thus where a destitute woman who had resided for sixteen years in the parish of S. gave up her lodgings and wandered about the parish by day and slept on door-steps at night, and then for three weeks slept in a refuge in another parish, but returning each day until she was admitted into the workhouse, it was held that she had not ceased to reside in S., and was therefore irremovable (*R. v. Shoreditch*, 1865, L. R. 1 Q. B. 21; 6 B. & S. 784; 35 L. J. M. C. 48; 29 J. P. 728). The residence must be continuous and without break (*R. v. Llanelly*, 1851, 17 Q. B. 40; 20 L. J. M. C. 179; 15 J. P. 534). A temporary absence out of a parish for the purpose of fulfilling a contract does not amount to a break of residence (*R. v. Brighthelmstone*, 1854, 4 El. & Bl. 236; 24 L. J. M. C. 41).

Whether or not there has been a break of residence would seem to depend on the particular circumstances of each case, the point being not only whether a person has left the one parish, but whether he intended to reside permanently in another (*R. v. St. Ives*, 1872, L. R. 7 Q. B. 467; 41 L. J. M. C. 41; 36 J. P. 645). Thus an absence for a mere temporary purpose, with an intention to return, will be no break in the residence. But an intention to return at a remote period, after a permanent absence, is not sufficient to prevent the absence from being a break (per Blackburn, J., in *Wellington v. Whitchurch*, 1863, 4 B. & S. 100; 32 L. J. M. C. 189; 27 J. P. 644). Where a pauper having acquired a status of removability from the parish of B., by residence went into the parish of C., and there met with an accident, and was there taken into the workhouse, and after being cured was detained in the workhouse by subsequent illness, the Court of Queen's Bench held an order removing him to W., his place of settlement, correct (*R. v. Cuckfield*, 1855, 25 L. J. M. C. 4; 20 J. P. 196). In *R. v. Stourbridge*, 1865, 34 L. J. M. C. 179; 11 Jur. N. S. 799, it was held that a pauper, having occupied lodgings in a parish, and who left the parish intending to return as soon as trade became better, but did not retain his lodgings, although he left some old clothes with his landlord to keep for him, and could have returned to his lodgings at any time, had not been constructively resident in the parish, and that his absence constituted a break of residence. The break of residence must be due to the voluntary act of the party in order to destroy the status of irremovability. Thus where a pauper who was irremovable became insane and was removed into another union by her mother, it was held that she had not lost her status of irremovability thereby (*R. v. Whitby*, 1870, L. R. 5 Q. B. 325; 39 L. J. M. C. 97; 34 J. P. 725; *R. v. Bruce*, [1892] 2 Q. B. 136; 56 J. P. 567). In the following case it has been held that there had been a break of residence. A pauper, a journeyman tailor, having resided in the parish of B. for forty-five years, was admitted into the workhouse. R., a tailor living



in a neighbouring parish, being in want of a hand, the master tailor of the workhouse told the pauper he might go to R., and if R. and he did not agree, he might come back. The pauper went to R. and worked for him for ten weeks, when he and R. not agreeing, the pauper came back to the workhouse. If they had agreed, the pauper might have continued working for R., and R. told the pauper he might stay as long as he thought proper (*R. v. Birmingham*, 1874, L. R. 9 Q. B. 340; 43 L. J. M. C. 102; 38 J. P. 407). See also *Totness Union v. Cardiff Union*, *post*, p. 207. Imprisonment out of the parish does not constitute a break of residence, not even if the sentence be of penal servitude (*R. v. Hartfield*, 1852, 21 L. J. M. C. 65; 16 J. P. 181; *R. v. Potterhanworth*, 1858, 28 L. J. M. C. 56; 23 J. P. 564). The time during which the pauper was in jail is to be deducted merely (9 & 10 Vict. c. 66, s. 1).

By the 11 & 12 Vict. c. 111, whenever any person has a wife or children having no other settlement than his or her own, such wife and children are removable from any parish or place from which he or she would be removable notwithstanding any provisions of the 9 & 10 Vict. c. 66, and are not removable from any parish or place from which he or she would not be removable by reason of any provision in the last-mentioned statute. This section operates to render a wife or children irremovable only where the husband or father has acquired a status of irremovability under the provisions of 9 & 10 Vict. c. 66 (*R. v. East Stonehouse*, 1854, 23 L. J. M. C. 137). But where the husband cannot be removed on account of his absence from the parish or other cause, this fact does not render the wife and children irremovable, as, for instance, in the case of a deserted wife and her children (*R. v. St. Ebbe*, 1848, 18 L. J. M. C. 14; 13 J. P. 216). When a child has a different settlement from its mother, as in the case where a widow with a legitimate child marries a second husband, the child cannot whilst under the age of nurture (seven) be separated from its mother even with her consent (*R. v. Birmingham*, 1843, 13 L. J. M. C. 1; 7 J. P. 705). A wife cannot be removed from her husband's parish of irremovability, and this applies even if the husband is in prison in that parish, provided there is a possibility of consortium between them (*R. v. Stogmuber*, 1839, 9 Ad. & E. 622; 8 L. J. M. C. 20). A married woman, deserted by her husband, can gain a status of irremovability by residence for one year after his desertion in such manner as would, if she were a widow, render her exempt from removal, and she is not liable to be removed from the parish wherein she shall be resident, unless her husband return to cohabit with her (24 & 25 Vict. c. 55, s. 3; 29 & 30 Vict. c. 113, s. 17). The point will sometimes arise as to what amounts to desertion for the purposes of this section. In the case of *R. v. Maidstone*, 1879, 5 Q. B. D. 31; 49 L. J. M. C. 25; 44 J. P. 440, where the husband did not absent himself from the conjugal home, but turned his wife out because she had committed adultery, and refused to receive her back, the Court held that there had been such a desertion of him by her as to bring the case within 24 & 25 Vict. c. 55, s. 3. But where the wife departed from the conjugal home of her own free will, and remained absent for some years living in adultery with another man, it was held to be otherwise (*R. v. Cookham*, 1882, 9 Q. B. D. 522; 47 J. P. 116). As to the irremovability of widows, the 9 & 10 Vict. c. 66, s. 2, enacts that no woman, residing in any parish with her husband at the time of his death, shall be removed, nor shall any warrant be granted for her removal from such parish for twelve calendar months next after his death, if she so long continue a widow. This exemption from removal, enjoyed by a widow for twelve months after her husband's death, is lost by a



break of residence within the year of her widowhood (*R. v. St. Marylebone*, 1851, 16 Q. B. 352 ; 20 L. J. M. C. 173).

No child under the age of sixteen years, whether legitimate or illegitimate, residing in any parish with his or her father or mother, stepfather or stepmother, or reputed father, shall be removed, nor shall any warrant be granted for the removal of such child from such parish in any case where such father, mother, stepfather, stepmother, or reputed father may not lawfully be removed from such parish (9 & 10 Vict. c. 66, s. 3). And by sec. 2 of the 24 & 25 Vict. c. 55, where a child under the age of sixteen years residing with its surviving parent shall be left an orphan, and such parent shall at the time of death have acquired an exemption from removal by reason of continued residence, such orphan shall, if not otherwise irremovable, be exempt from removal in like manner and to the same extent as if it had then acquired for itself an exemption from removal by residence.

No warrant may be granted for the removal of any person becoming chargeable in respect of relief made necessary by sickness or accident, unless the justices granting the warrant are satisfied that the sickness or accident will produce permanent disability (9 & 10 Vict. c. 66, s. 4).

Pregnancy is not "sickness" within the meaning of this section (*R. v. Huddersfield*, 1857, 26 L. J. M. C. 169 ; 22 J. P. 160); but incurable blindness is (*R. v. Bucknell*, 1854, 23 L. J. M. C. 129 ; 18 J. P. 503). The 9 & 10 Vict. c. 66, s. 6, provides a penalty for illegally procuring the removal of any poor person who becomes chargeable to any parish to which he was not before chargeable.

*Settlement*.—If a pauper is not irremovable, and it is sought to remove him, his last place of settlement will have to be ascertained. A pauper's settlement may have been gained by himself by residence, by having been bound apprentice, by owning an estate, or by renting a tenement, or it may be derived from a parent, or, in the case of a woman, from her husband. And, lastly, there is the settlement by birth, upon which it may be possible to throw the pauper should he be found not to have any other settlement.

*Residence*.—Since the 15th of August 1876 a settlement may be gained by any person who has resided for three years in any parish in such a manner and under such circumstances in each of such years as would have rendered him irremovable (39 & 40 Vict. c. 61, s. 34 ; and see *ante*, *Persons Irremovable*). The word "parish" in this section does not include a union (*Plomesgate Union v. West Ham Union*, 1881, 6 Q. B. D. 576 ; 45 J. P. 633 ; *Guardians of Sunderland v. Sussex*, 1881, 8 Q. B. D. 99 ; 46 J. P. 375 ; 51 L. J. M. C. 4). But where B., a city comprising eighteen parishes, by a local Act was incorporated so that one uniform rate for the poor might be made in each parish, and it was adjudged that a pauper had by three years' residence in B. acquired a settlement under this section, it was held by the Queen's Bench Division that the order was rightly made (*Bristol v. Barton Regis*, 1892, 56 J. P. 311). The residence of the wife cannot be treated as the residence of the husband. Thus, where a seaman left his wife and went to sea with the intention of returning to her, and during his absence she removed from the parish in which they were residing and took lodgings in another parish where he joined her, it was held, in the absence of evidence that the lodgings were taken by the husband's directions, that he could not be treated as having been constructively resident there, and that the period which elapsed between his return could not be computed as part of a three years' residence by him (*West Ham Union v. Cardiff Union*, [1895] 1 Q. B. 766 ; 59 J. P. 343). The expression "term of three years" means an



unbroken period of three consecutive years (*Dorchester v. Weymouth*, 1885, 16 Q. B. D. 31; 55 L. J. M. C. 44; 50 J. P. 310). Time spent as a patient in a hospital must be excluded from the calculation (*St. Olave's Union v. Canterbury Union*, [1897] 1 Q. B. 682; 61 J. P. 371). Long absence, as, for example, a year out of the county engaged at work, has been held to amount to a break of residence (*Totnes Union v. Cardiff Union*, 1886, 51 J. P. 133).

The effect of sec. 34 of the 39 & 40 Vict. c. 61 is not retrospective, and therefore it is necessary, in order to give a pauper a settlement, that some part of the three years' residence should have been after 15th August 1876 (*R. v. Guardians of Ipswich Union*, 1877, 2 Q. B. D. 269; 46 L. J. M. C. 207). In *R. v. Bampton Union*, 1878, 3 Q. B. D. 479; 43 J. P. 156; 47 L. J. M. C. 114, it was held that a person who had resided in a parish for the term of three years, and who continued to reside there until the passing of the Act, but who, during the period subsequent to the three years, had been in receipt of relief from the parish, acquired a settlement therein under the section. A pauper who had resided for three years in a reformatory in the parish of F., which was supported by offertories from without the parish and by annual subscriptions from persons resident all over the country, she paying nothing for her maintenance and clothing, was held to be settled in F., as the money collected for her maintenance was a *bonâ fide* charitable gift, and she had not been maintained by a rate or subscription raised in a parish in which she did not reside, within the meaning of the proviso to sec. 1 of the 9 & 10 Vict. c. 66 (*Guardians of Fulham v. Guardians of Thanet*, 1881, 7 Q. B. D. 539; 45 J. P. 552). A deserted wife can gain a settlement by three years' residence (24 & 25 Vict. c. 55, s. 3; *R. v. Maidstone*, 1879, 5 Q. B. D. 31; 44 J. P. 440; 49 L. J. M. C. 25).

Residence under sixteen, if consistent with irremovability, may be added to residence over sixteen, so as to constitute residence for "the term of three years" (*Reigate Union v. Croydon Union*, 1889, 14 App. Cas. 465).

In the *Guardians of West Ham v. St. Matthew, Bethnal Green*, [1894] App. Cas. 230; 58 J. P. 493, where a pauper, nearly fourteen years old, went into domestic service in the parish of L. in the West Ham Union, remained there nearly four years, and left before she became eighteen and resided outside the union with her mother, her father having died when she was two years old, and her widowed mother never having resided in or become irremovable from or gained a settlement in that union, it was held that upon the true construction of the 9 & 10 Vict. c. 66, s. 1, and the 11 & 12 Vict. c. 111, s. 1, and the 39 & 40 Vict. c. 61, s. 34, the pauper had not resided for the term of three years in the parish of L. in such manner and in such circumstances in each of such years as would in accordance with the statutes in that behalf render her irremovable, and she had not therefore gained a settlement in the West Ham Union.

A pauper, whose settlement both by birth and parentage was in the appellant union, had, before he was sixteen years of age, resided in another union for the term, in the manner and under the circumstances required by this section to acquire a settlement by residence. It was held that he had gained a settlement in the latter union, and was therefore irremovable from it (*Wolstanton and Burslem Union v. Northwich Union*, 1882, 46 J. P. 377; 46 L. T. 528).

By the 9 & 10 Vict. c. 66, s. 6, a person exempted from liability to be removed cannot by reason of such exemption acquire a settlement in any parish.

*Apprenticeship.*—If any person shall be bound an apprentice by inden-



ture, and inhabit in any town or parish, such binding and inhabitation is adjudged a good settlement (3 Will. & Mary, c. 11, s. 7). But an apprentice must reside in a place for forty days under the indenture in order to gain this settlement (31 Geo. II. c. 11). Where a boy was apprenticed, and served and resided in an extra-parochial place, it was held he gained no settlement by it (*Clerkenwell v. Bridewell*, 1699, 1 Raym. (Ld.) 549).

It is not necessary that the residence should be in the place where the apprentice was bound, nor where the master resides. This was so held in *St. Bride's v. St. Saviour's*, 1706, 2 Salk. 533, where a woman settled in the latter place took an apprentice, and afterwards took a lodging in the former place, where the apprentice resided, and served for more than forty days, the apprentice's settlement being adjudged to be in St. Bride's, although her mistress was not settled there. Inhabitation under a valid assignment is good (*R. v. Barnsley*, 1813, 1 M. & S. 377), and even if the assignment be bad, it will be deemed a service by consent of the master, and inhabitation during such service will gain a settlement (*R. v. Barlestone*, 1822, 5 Barn. & Ald. 780). And where an apprentice has served under an agreement in writing and not under seal, and it is duly stamped, he acquires a settlement under 31 Geo. II. c. 11 (*Woodstock v. Shipton-on-Stour* 1893, 57 J. P. 167). In order to gain a settlement by serving apprenticeship, there must be a real apprenticeship, *i.e.* where the object of the master is to teach, and of the apprentice to learn, a mere contract of hiring is not sufficient. Whether it is so or not is a question of fact for the sessions to determine (*R. v. Great Wishford*, 1835, 4 Ad. & E. 216).

Since the passing of the 4 & 5 Will. IV. c. 76, a settlement cannot be acquired by hiring and service (see s. 64). This section also abolished settlement by serving an office.

*Estate.*—If a person owns an estate in a parish, however small, which he has acquired otherwise than by purchase, and resides there for forty days, he gains a settlement. By the 9 Geo. I. c. 7, s. 5, if he has purchased the estate, he must *bonâ fide* have paid at least £30 for it in order to acquire a settlement by forty days' residence. A settlement by estate is not retained after the owner has ceased to reside within ten miles from the boundary of the parish in which it is situate. In such a case the pauper is liable to be removed to the place where he was previously settled, or to the place where he has subsequently gained one (4 & 5 Will. IV. c. 76, s. 68).

*Renting Tenement, Paying Rates.*—A settlement may be gained by renting or rating a tenement. The tenement must consist of a separate and distinct dwelling-house or building, or of land, or of both, *bonâ fide* by such person at a yearly sum of £10 at least, for the term of a whole year. The premises must be actually occupied, and the rent, to the extent of at least £10, actually paid for one whole year at least (6 Geo. IV. c. 57, s. 2; 14 Car. II. c. 12). A person renting and residing in a toll-house does not gain a settlement thereby (54 Geo. III. c. 170, s. 5), nor by residing in a charitable institution (*ibid.* s. 6).

*Marriage.*—A woman on her marriage takes her husband's settlement by sec. 35 of 39 & 40 Vict. c. 61: "No person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise, except in the case of a wife from her husband." Where a wife resided with her husband in a parish for more than three years continuously, and after his death continued to reside as a widow in the same parish for three months, the settlement of the wife and her children (who were all under six years of age) was held to be in that parish, the wife and children taking that settlement by virtue of sec. 35 (*Reigate Union v. Croydon Union*, 1889,



14 App. Cas. 465). Where a husband had never acquired a settlement for himself, it was held that he took his father's settlement, it not being derivative, and that the wife took the same settlement, and not the birth settlement of her husband (*West Ham Union v. St. Giles-in-the-Fields Overseers*, 1890, 25 Q. B. D. 272). A widow retains the settlement she had from her husband until she acquires another (Lord Watson in *Reigate Union v. Croydon Union*, 1889, 14 App. Cas. 482).

*Parentage.*—Settlement by parentage is now regulated by sec. 35 of the 39 & 40 Vict. c. 61. By that section—

no person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise, except . . . in the case of a child under sixteen years, which shall take the settlement of its father or its widowed mother, as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another. An illegitimate child shall retain the settlement of its mother until such child acquires another settlement. If any child in this section mentioned shall not have acquired a settlement for itself, or, being a female, shall not have derived a settlement from her husband, and it cannot be shown what settlement such child or female derived from the parent without inquiring into the derivative settlement of such parent, such child or female shall be deemed to be settled in the parish in which they were born.

Where a father dies and a widowed mother does not subsequently acquire a settlement, a child under sixteen takes the father's settlement, and not the mother's maiden settlement (*Reigate Union v. Croydon Union*, 1889, 14 App. Cas. 465). Where the settlement of the father of a pauper child under sixteen could not be ascertained, the child may take its mother's settlement, although that settlement could not be determined without inquiring into her derivative settlement (*West Derby Union v. Atcham Union*, 1889, 24 Q. B. D. 117). An illegitimate child, like a legitimate child, cannot gain a settlement for itself while under the age of sixteen, but must follow the settlement of its mother (*Manchester Overseers v. Ormskirk Union*, 1890, 24 Q. B. D. 678). Where a child, after living in the appellant union with its father, who had acquired a settlement by residence there, removed with him into the respondent union, and, while residing there with him as part of his family, attained the age of sixteen and became chargeable, it was held that the father, being irremovable, the child was not removable to the appellant union, by virtue of 11 & 12 Vict. c. 111, s. 1 (*Mitford Union v. Wayland Union*, 1890, 25 Q. B. D. 164). Where a father had acquired no settlement for himself since he attained the age of sixteen, and his father's settlement was a derivative one, it was held that a child who had become chargeable under the age of sixteen, and during his father's lifetime, was settled in the parish in which the child's father was born (*Bath Union v. Berwick-upon-Tweed Union*, [1892] 1 Q. B. 731). A child under the age of sixteen of a first marriage does not follow the settlement derived by its mother from a second marriage (*Llanelly Union v. Neath Union*, [1893] 2 Q. B. 38; see also 56 J. P. 483, 499, 515). Where the mother of an illegitimate child has a settlement, whether derivative or not, at the time of birth of the child, the child takes that settlement. If subsequently, before the child attains the age of sixteen, or, being a female, acquires a settlement by marriage, the settlement of the mother changes, whether by virtue of her acquiring a new settlement in her own right or by marriage, the settlement of the child changes likewise, and follows that of the mother. In this respect there seems to be still a difference between legitimate and illegitimate children. On the remarriage of the mother of legitimate children under sixteen, they do not take the settlement of the mother, which she acquires from her second marriage; but the illegitimate



child of a woman who subsequently acquires a settlement by marriage does take that settlement if it is under sixteen, and has not, being a female, acquired a settlement by marriage (see 57 J. P. 4, 19).

*Birth.*—The place of birth is *primâ facie* the place of settlement of a poor person (*R. v. Heaton*, 1796, 6 T. R. 653). In the words of Coleridge, J., in *R. v. All Saints, Derby* (1849, 14 Q. B. 207; 19 L. J. M. C. 14), "it is an established principle that every English subject has a birth settlement *primâ facie*; that is, till an acquired settlement is shown; until then it is no more than *primâ facie*; and when it is ascertained that the father or mother has an English settlement, that is the settlement of the child." And this will be so although the parents have no settlement (*R. v. Newchurch*, 1862, 32 L. J. M. C. 19), and whether the parents be natives of this country or of Scotland or Ireland (*R. v. Preston*, 1840, 12 Ad. & E. 822), or even of a foreign country. But by the 54 Geo. III. c. 170, s. 2, no person born in a prison or in a lying-in hospital shall be taken or deemed to have acquired a settlement thereby. In the case of a child born in a workhouse, such person shall, for the purposes of settlement, be deemed and taken to be born in the district, parish, township, or hamlet by whom the mother of such person was sent to, and on whose account the mother of such person was received and maintained in such house (54 Geo. III. c. 170, s. 3). And now, by the 7 & 8 Vict. c. 101, s. 56, the workhouse of a union is to be deemed to be in the parish to which each poor person therein is or has been chargeable (*R. v. St. Clements Danes*, 1862, 32 L. J. M. C. 25). By the 28 & 29 Vict. c. 79, s. 1, the relief of all classes of poor persons in unions is chargeable to the common fund of the union.

#### THE REMOVAL.

Guardians in unions may obtain orders of removal in respect of paupers settled elsewhere (28 & 29 Vict. c. 79, s. 2; *R. v. Northwich Union*, 1867, L. R. 2 Q. B. 383). Boards of guardians for single parishes under the 4 & 5 Will. IV. c. 76, s. 39, may be authorised by the Local Government Board to apply for orders and defend appeals in like manner as boards of guardians in unions (39 & 40 Vict. c. 61). Orders of removal may be defended and appealed against (28 & 29 Vict. c. 79, s. 3). Where the guardians of any union or parish are satisfied that any pauper is settled in and removable to their union or parish, they may consent to receive such pauper, and he may be removed without an order (*ibid.* s. 6). Before a pauper is removed, he, and such other witnesses as may be necessary to prove the settlement, should be examined before two justices of the county in which the removing union is situated. The examination should be taken down in writing. The attendance of the pauper may be enforced, if necessary, by summons or warrant. If the pauper is too ill or infirm to attend the examination, one justice of the peace may visit him and take his examination, and report the same to the other justices acting for the district, and the latter may, upon such report, make an order (49 Geo. III. c. 124, s. 4).

The guardians applying for an order of removal must satisfy the justices, by evidence, of the facts necessary to entitle them to an order. Thus the residence of the pauper in their union at the time should be proved (*R. v. Rotherham*, 1842, 12 L. J. M. C. 17), and a certificate of chargeability produced, as provided for by sec. 17 of the 5 & 6 Vict. c. 57. The order may be made by any two justices of the division in which the union is where the pauper is chargeable (35 Geo. III. c. 101, s. 1); but one justice may receive the complaint of the guardians (*R. v. Westwood*, 1718, 1 Stra. 73; 2 Bott P. L. Cas. 631). The order should state on the face of it that the pauper was



chargeable at the time of making it, and the name of the union or parish to which he had become chargeable (*R. v. Bourn*, 1735, 1 Burr. S. C. 39; *R. v. Ufculm*, 1739, *ibid.* 138). By the 4 & 5 Will. IV. c. 76, s. 84, the cost of relief of a pauper by the removing union can be recovered back from the union he is adjudged to belong to, from the date of notice of chargeability. An order of removal may be abandoned by the guardians in whose favour it was obtained (11 & 12 Vict. c. 31, s. 8). Where the pauper is too ill to travel, the justices may suspend the order for removal (35 Geo. III. c. 101, s. 2, and 49 Geo. III. c. 124, s. 3). Where an order of removal, not suspended at the time of making it and not appealed against, cannot be executed at the expiration of twenty-one days by reason of the sickness of the pauper, the justices may make a fresh order of removal, and suspend the same without any formal *supersedeas* or notice of abandonment of the previous order (56 J. P. 297).

An order of removal may be appealed against. The time and conditions for appealing against the removal of a pauper are regulated by the Poor Law Acts, and are not affected by the Summary Jurisdiction Acts (*R. v. Somersetshire JJ.*, 1889, 53 J. P. 470). The appeal lies to the general or Quarter Sessions of the county or borough wherein respectively the union or parish from which the pauper is to be removed is (8 & 9 Will. III. c. 30, s. 6; 45 & 46 Vict. c. 50, s. 165). By the 14 & 15 Vict. c. 105, s. 12, the guardians between whom there is any question affecting the settlement, removal, or chargeability of any pauper, may agree to submit it to the determination of the Local Government Board, and the decision of the Board will, as between the parties, be final and conclusive.

Any person returning to or becoming chargeable to any parish from which he shall have been legally removed by order of two parties (unless he shall produce a certificate of the overseers of some other parish acknowledging him to be settled there) shall be deemed an idle and disorderly person, and may, on conviction, be imprisoned for any period not exceeding one calendar month (5 Geo. IV. c. 83, s. 3). And any person removed under an order of removal obtained by the guardians of any union returning to and becoming chargeable to such union again within the period of twelve months from such removal, without the consent of the guardians thereof, is to be deemed an idle and disorderly person within 5 Geo. IV. c. 83, and may be punished accordingly (28 & 29 Vict. c. 79, s. 7; *R. v. Fillongley*, 1788, 2 T. R. 709; *R. v. Barham*, 1828, 8 Barn. & Cress. 99; *Mann v. Davers*, 1819, 3 Barn. & Ald. 103).

#### POOR NOT SETTLED IN ENGLAND.

*Scotland, Ireland, Isle of Man, and Channel Islands.*—Persons born in Scotland or Ireland, or in the Isle of Man, or Scilly, or Jersey, or Guernsey, not settled in England, and becoming chargeable in England, by reason of relief given to himself or herself, or to his wife, or to any legitimate or bastard child, are liable to be removed to those places, if in such a state of health as not to be liable to suffer bodily or mental injury by the removal (8 & 9 Vict. c. 117, s. 2; 10 & 11 Vict. c. 33, s. 1; 24 & 25 Vict. c. 76, ss. 1, 2; 25 & 26 Vict. c. 113, ss. 1, 2). Every person authorised to take and convey any such poor person before justices has all the rights, privileges, powers, and immunities with which a constable is by law invested (10 & 11 Vict. c. 33, s. 3). Such poor persons cannot be removed if they have resided the specified time (see *ante*, p. 203) in a parish in England. Where children born in England of an Irish father and an Irish mother became chargeable, while under sixteen, after the father had deserted them



and the mother had died, it was held that they were removable to the parish of their birth, the Act 8 & 9 Vict. c. 117, s. 2, *supra*, not making English-born children removable directly, but only as part of the family of a parent who is removed (*R. v. All Saints, Derby*, 1849, 14 Q. B. 207; 19 L. J. M. C. 14; 14 J. P. 3). Where an Irishman, having no English settlement, married a woman settled in A., and lived with her in B. in England for more than five years, and then deserted her and left the kingdom, it was held that she was removable from B. to A., and not to Ireland (*Much Hoole v. Preston*, 1851, 17 Q. B. 548; 21 L. J. M. C. 1; 16 J. P. 212). Similarly, a daughter becoming chargeable in a different parish from that in which her parents, who were Irish without a settlement, resided, is not removable to Ireland, but to her birth settlement in England (*R. v. St. Giles, Cripplegate*, 1851, 21 L. J. M. C. 26; 15 Jur. 1154; 16 J. P. 244). Where a husband born in Ireland had deserted his wife and children, it was held that they could not be removed to Ireland without the husband, who was the head of the family (*Poor Law Commissioners of Ireland v. Liverpool*, 1869, L. R. 5 Q. B. 79; 39 L. J. M. C. 251; 34 J. P. 294). See *R. v. Leeds*, 1821, 4 Barn. & Ald. 498; *R. v. Cottingham*, 1827, 7 Barn. & Cress. 615, as to the law before the passing of the 8 & 9 Vict. c. 117.

*Foreign Poor.*—A foreigner may gain a settlement (*R. v. Eastbourne*, 1803, 4 East, 103), but until he has gained a settlement the union to which he becomes chargeable is liable to maintain him (*St. Giles v. St. Margarets*, 1715, 1 Sess. Ca. 97; *Ellinor Cowred's case*, 1695, Comb. 287; 2 Bott P. L. Cas. 17).

#### RATING.

For the general law, see GUARDIANS OF THE POOR; OVERSEERS; RATING. *Agricultural Rates* may here be dealt with.

By the Agricultural Rates Act, 1896, an important change has been made in the rating of agricultural land in England for the period of five years after 31st March 1897. By sec. 1, occupiers (which term includes owners where owners are rated in place of occupiers) of agricultural land in England are to be liable in the case of every rate to which the Act applies, to pay one-half only of the rate in the pound payable in respect of buildings and other hereditaments. Agricultural land is defined by sec. 9; it means "any land used as arable, meadow, or pasture ground only, cottage gardens exceeding one-quarter of an acre, market gardens, nursery grounds, orchards, or allotments, but does not include land occupied together with a house as a park, gardens other than as aforesaid, pleasure grounds, or any land kept or preserved mainly or exclusively for purposes of sport or recreation, or land used as a racecourse." The Act applies to every rate made during the continuance of the Act, the proceeds of which are applicable to public local purposes, and which is leviable on the basis of an assessment in respect of the yearly value of property; but it does not apply to a rate under which the occupier of agricultural land, as compared with other occupiers, is assessed at one-half, or less than one-half, or to a rate assessed under any commission of sewers, or in respect of works for the benefit of the land (s. 1, subs. 2). The deficiency in the produce of rates, through the operation of the Act, is to be met by an annual grant from the Local Taxation Account, payable half-yearly to each "spending authority," as defined by the schedule. The amount of the deficiency is to be estimated by the Local Government Board, and is to be estimated once and for all for the period of five years. The amount of deficiency is to be arrived at by ascertaining the total



amount produced by those rates to which the Act applies during the last year before the passing of the Act, by further ascertaining the proportion contributed to such total by agricultural land, and one-half the amount so contributed by agricultural land is to be taken as the deficiency which will arise from the provisions of the Act (s. 4). To enable the Local Government Board to make such estimate, returns as to valuation, produce of rates, etc., are to be made by spending authorities (s. 6). Future valuation lists are to contain separate statements of the value of agricultural land, and buildings used only for the cultivation of land are to be valued not on their structural cost but on the rent at which they would be expected to let to a tenant from year to year, if they could only be so used (s. 5). The Local Government Board are empowered to make regulations for carrying the Act into effect (s. 6, subs. 3).

By an Order, dated 28th July 1896, the Local Government Board have made regulations with respect to returns by spending authorities, and as to the preparation by overseers, assessment committees, etc., of statements as to agricultural land, etc., to which reference should be made.

Sec. 8 deals with those cases where limits have been imposed on rates; it provides that "a limit imposed by any enactment on a rate shall be construed as being only a limit on the amount to be raised by that rate, and where by that limit or otherwise the sum to be raised or expended by a local authority is limited by any enactment by reference to a rate, the limit shall be varied so as to enable the local authority to raise or expend the same sum as they might have done if this Act had not passed, and in the case of a spending authority receiving any sum paid under this Act out of the local taxation account in respect of such rate, that sum shall be deemed to be part of the sum raised thereby." See also MARKET GARDENS.

[*Authorities.*—Archbold's *Poor Law*, 14th ed., 1885; Burn's *Justice of the Peace*, vol. iv. "Poor," 13th ed., 1869; Macmorran and Lushington's *Poor Law General Orders*, 1890; Mackenzie's *Poor Law Guardian*, 4th ed., 1895; Symonds, *Law of Settlement*, 3rd ed., 1891. The *Poor Law Statutes*, down to the year 1889, have been edited by W. C. Glen and A. Macmorran.]

**Pope** (in Latin *papa*)—A title originally applied familiarly to all bishops of the Catholic Church, but now borne exclusively by the Bishop of Rome. The pope is officially described as "Holy Father," "Vicar of Christ," "Sovereign Pontiff," is usually addressed as "Your Holiness," and describes himself when signing as *Servus servorum Dei*.

Though the pope has no recognised status in Great Britain, and no control is exercised, as in France (see CONCORDAT), over Roman ecclesiastical authorities within the British jurisdiction, there are still many provisions in the Statute-book affecting the pope and papists.

From exorbitant powers at one time claimed in England by the popes are derived the famous Statutes of *Præmunire*, "framed," says Blackstone, "to encounter this overgrown yet encreasing evil." They date back to long before the Reformation. Open resistance to the pope, in fact, seems to have begun with Edward I., who "would not suffer his bishops to attend the general council till they had sworn not to receive the papal benediction."

He made light of all papal bulls and processes, attacking Scotland in defiance of one, and seising the temporalities of his clergy, who, under pretence of another, refused to pay a tax imposed by Parliament. He strengthened the statutes of mortmain, thereby closing the great gulf in which all the lands of the kingdom were in danger of



being swallowed. And one of his subjects having obtained a bull of excommunication against another, he ordered him to be executed as a traitor according to the ancient law. And in the thirty-fifth year of his reign was made the first statute against papal provisions, which, according to Sir Edward Coke, is the foundation of all the subsequent statutes of *præmunire*; which we rank as an offence immediately against the king, because every encouragement of the papal power is a diminution of the authority of the Crown (*Commentaries*, bk. iv. ch. viii. p. 111, edition 1770).

This statute was followed by others in a similar sense, one of which, adopted in the reign of Richard II., still in force (16 Rich. II. c. 5), is in particular called the Statute of *Præmunire*, from the words of the writ preparatory to the execution thereof. This term has since come, not only to denominate the writ, but also the offence itself, *i.e.* the offence of in any wise maintaining the papal power; the penalties attaching to it are called penalties of *præmunire*. The offence consists, says Blackstone, in "introducing a foreign power into this land and creating *imperium in imperio* by paying that obedience to papal process which constitutionally belonged to the king alone." Thus are forbidden, under pain of *præmunire*, the collation or provision by the see of Rome to an archbishopric, bishopric, dignity, or benefice, and the introduction of provisions by writ of exigent (25 Edw. III. st. 4; 38 Edw. III. st. 2; 12 Rich. II. c. 15; 13 Rich. II. st. 2, cc. 2, 3; 2 Hen. IV. c. 3; 25 Hen. VIII. c. 20; 1 Eliz. c. 1); and purchase of, use of, or acting under processes, sentences of excommunication, bulls, dispensations, licences, etc. (16 Rich. II. c. 5; 25 Hen. VIII. c. 20; 25 Hen. VIII. c. 21; 28 Hen. VIII. c. 16; 1 Eliz. c. 1; 13 Eliz. c. 2; and 9 & 10 Vict. c. 59).

There are also provisions in the Statute-book against suits and appeals to the see of Rome (38 Edw. III. st. 2; 13 Rich. II. st. 2; 24 Hen. VIII. c. 12; 25 Hen. VIII. c. 19; 1 Eliz. c. 1); against payments to the see of Rome of pensions or Peter's pence (25 Hen. VIII. c. 21; 1 Eliz. c. 1), and first fruits (23 Hen. VIII. c. 20; 25 Hen. VIII. c. 20; 1 Eliz. c. 1); and against the observance of papal interdicts (24 Hen. VIII. c. 12; 1 Eliz. c. 1).

Roman Catholics were formerly under certain disabilities, which have now for the most part been removed (see ROMAN CATHOLIC). See, for ecclesiastical law before the Reformation, CANON LAW.

Since 1870 the pope has ceased to be a temporal sovereign, and his legal position in Italy is now regulated by the Law of Papal Guarantees of 13th May 1871, by which, *inter alia*, the sanctity and inviolability of his person, the free enjoyment of the Vatican and Lateran Palaces, with all edifices, gardens, and property appertaining to them, and the papal country residence, are declared exempt from the Italian jurisdiction (see EXTERRI-TORIALITY). The pope's sovereign status and independence, in particular, are specially acknowledged in the preservation of his right of embassy (see LEGATE; NUNCIO). No restriction, moreover, is placed upon his free correspondence with the episcopate and the whole Catholic Church. But every appeal to the temporal power is abolished, and the employment of any secular compulsion is now excluded from ecclesiastical measures (see a full description of the law of guarantees in Geffcken's *Church and State*).

On the Continent the papal see is still a power to be reckoned with throughout the Roman Catholic world, and it has never ceased to endeavour to exercise its power to influence the temporal affairs of mankind generally.

"The necessary postulates for this," says Geffcken, "were the divine origin of its constitution, and the secular independence of its head. The Reformation, which denied the first, stripped the Roman Church of a large province of authority; but over the territory she still retained her sway was all the more secure, and the temporal rule of



the pope remained untouched. The philosophy of the eighteenth century weakened the Church internally, but from the ordeal of the Revolution she came forth with fresh strength and vigour, and understood how to utilise every stage of that grand progress, which began with 1789, to re-establish and extend her shattered power. If, after the lapse of fifty years, she looked back upon what she had gained, she had every reason to contemplate her progress with satisfaction" (*Church and State*, p. 294).

Then began her great struggle against modern thought, the first result of which was the famous Encyclical of December 8, 1864, and the syllabus appended to it detailing the errors condemned by the papal see.

"In a motley crowd," says Geffcken, "this catalogue comprehends not only those doctrines which contradict beyond all dispute the Christian revelation and civil order, but those also which form the very pith and marrow of our modern civilisation." (For fuller particulars, see his book, pp. 297 *et seq.*)

Of late years the contemporary spirit of intellectual compromise seems to have invaded even the Roman Church. It has once more endeavoured to lead all men, and, as in the Middle Ages, when the popes acted as peace-makers among nations, adjusting differences between sovereigns, between sovereigns and cities, and between suzerains and vassals (see ARBITRATION, INTERNATIONAL), so the pope seeks to regain a position in the civilised world as a mediator and arbitrator in the affairs of mankind, a position which, by the way, but for the suppression of his temporal power, would have been impossible. (See INDEX in Appendix, vol. xii.)

[*Authorities.*—Geffcken, *Church and State*, trans. by Fairfax Taylor, London, 1877; Nys, *The Papacy and International Law*, London, 1879; Holtzendorff, *Handbuch des Völkerrechts*, Hamburg, 1887 ("Papst" by Prof. Geffcken); Piédelièvre, *Précis de droit International Public*, Paris, 1895 (Appendix: "De La Papauté en Droit International").]

**Popery.**—See POPE; ROMAN CATHOLIC.

**Popular Action.**—See QUI TAM.

**Port.**—Lord Hale defines a port thus: "A port is a haven and somewhat more. First, it is a place for arriving and unlading of ships and vessels. Second, it hath a superinduction of a civil signature upon it, somewhat of franchise and privilege, as shall be shown. Third, it hath a ville, or city, or borough, that is the *caput portus*, for the receipt of mariners and merchants, and the securing and vending of their goods, and victualling their ships. So that a port is *quid aggregatum*, consisting of somewhat that is natural, viz. an access of the sea whereby ships may conveniently come, safe situation against winds where they may safely lie, and a good shore where they may well unlade; something that is artificial, as keys, wharfs, cranes, warehouses, and houses of common receipt; and something that is civil, viz. privileges and franchises, viz. *jus applicandi*, *jus mercati*, and divers other additaments given to it by civil authority" (*De Portubus*; Hargreaves, 46, quoted by Lord Halsbury, *Hunter v. Northern M. I. C.*, 1888, 13 App. Cas. 717, 722).

Ports are the *ostia regni*, and every public port is a franchise or liberty, as a market or a fair, and much more, and their creation belongs to the Royal prerogative. No subject can set up a public port without charter from



the Crown or lawful prescription which approves such a charter, even the lord of a county palatine within his palatine jurisdiction. A port may belong to a subject, both as regards franchise, *i.e.* the right to charge tolls on persons making use of it, and as regards the soil below its waters. There is a threefold right in ports, viz. the *jus privatum*, or the right of property in the port, whether franchise or soil, from which arise the port duties, such as anchorage, ballastage, bursellage, keelage, lestage, prisage, and shore duties, such as towage, moorage, terrage, cranage, wharfage and quayage, housellage, and tolls, such as tronage or pesage and measurage; the *jus publicum*, or right of the public to have the port maintained in good order and free from hindrances to navigation; and the *jus regium*, or the right of the Crown of exercising superintendence over it, for the purpose of preserving the peace and safety of the kingdom, its commerce and trade, and the revenue and customs (Hale, *De Portubus, passim*). A port cannot be abolished except by Act of Parliament, unless it becomes totally useless by accident, as being sanded or stopped up by the sea (Hale, *First Treatise*; Moore, *Foreshore*, 327).

Hale elsewhere says, "A subject having a port of the sea may have, and in common experience and presumption hath, the soil of the port covered with water, for though the franchise differs from the propriety of the soil and the franchise may be in the subject and the propriety of the soil in the king or some other, in ordinary usage and presumption they go together. If the king at this day grant *portum maris de S.*, the king having the port in point of interest as well as in point of franchise, it may be doubtful whether at this day it carries the soil or only the franchise. But if it were an ancient grant, and usage had gone along with it that the grantee held also the soil, this grant might be effectual to pass both, for both are included in it. So if by prescription and custom a man hath *portum maris de S.*, in ordinary presumption he hath not only the franchise but also the very soil and water of the port, for *portus maris* is *quid aggregatum*, and such a presumption may carry soil as well as franchise; and though this doth not always hold, yet most times it doth" (*De Jure Maris*; Hargreaves, 33; Moore, 401). Mr. Stuart Moore, commenting on this passage, says this is generally the case where the port has belonged to an ancient barony, for grants of ports are more recent than grants of shore and soil, and therefore, generally, the franchise is added to the property (811); but the ownership of the soil is not necessary to the exercise of the franchise of a port, and it is very rare to find the franchise and the ownership of the port in the same hands, and owners who have only the franchise may take duties, groundage, and anchorage; and usually where the franchise of a port has been granted to the corporation of a town or city, the soil of the port is in the lords of the manors abutting upon it (Moore, 697, 809, 811).

The limits of a port vary according to the purpose for which it is instituted; and a port for fiscal purposes is not the same as it is for (municipal or) local purposes, or for pilotage, or for commercial purposes. There is a great distinction between local ports, the franchise of which may have been granted to a subject, and royal (or fiscal) ports remaining in the Crown. The former are usually confined to the matter of the rivers in which they are situate; the latter extend along the coast, and vary in extent from time to time by Royal Commission to suit the necessities of the public service; thus the local port of Plymouth extends to the Mewstone (outside the breakwater), but the fiscal port extends some miles along the coast outside the limits of the ancient local port (Moore, 810, 829).



The revenue port of Cardiff extends sixty miles down the Bristol Channel, but the ancient local port perhaps not farther than between Penarth and Bute Docks (*Sailing Ship Garston Co. v. Hickie*, 1885, 15 Q. B. D. 580); and similarly with the case of Greenock (*Hunter v. Northern M. I. C.*, 1888, 13 App. Cas. 717, 733, where the meaning of "in port" was also considered).

The creation of fiscal ports has always remained part of the Royal prerogative, and their boundaries have been fixed by Royal Commission; thus in 1684 a Royal Commission set out the limits of the *regiæ camerae* (king's chambers) *et portus regii* (Moore, 813, 814). This power is now exercised by the Treasury, which has power to appoint ports for the lading or unlading of goods and their limits, and similarly with quays, warehousing ports, sufferance wharves, and landing and boarding stations (1876, 39 & 40 Vict. c. 36, ss. 11-16); and any such ports are ports within the meaning of the Act of 1813 (54 & 55 Geo. III. c. 159, s. 14), from which no ballast or shingle may be taken unless with the leave of the Board of Trade (for a similar power in an earlier Act (9 & 10 Vict. c. 162), see *Nicholson v. Williams*, 1871, L. R. 6 Q. B. 632).

A place may have a port for pilotage purposes, *i.e.* the area within which its pilotage authority has jurisdiction, which extends beyond the limits of its port authority; *e.g.* for pilotage purposes, the port of Liverpool begins at Point Lynas (*Sailing Ship Garston Co. v. Hickie*, above); and the port of Bristol extends to the westernmost part of the Flat and Steep Holms in the Bristol Channel (*The Charlton*, 1895, 8 Asp. 29).

For business purposes, *i.e.* in commercial contracts, the limits of a port are determined neither by its fiscal, municipal, nor pilotage limits, but by the usage of the mercantile community there.

A port in this sense is a place of safety for the ship and goods, while the goods are being loaded or unloaded. . . . This may be a natural port, that is, a place in which the conformation of the land with regard to the sea is such that if you get your ship within certain limits, she is in a place of safety for loading and unloading. That is almost certain to be the port in a business sense, . . . a place where there is protected water by reason of the natural lie of the land and water. It may be an artificial port, made by breakwaters and walls. . . . It may be only a place of comparative safety, where neither the natural configuration of the land with regard to the sea nor the artificial walls make a perfectly safe port, . . . and it is then necessary to find out where, in fact, people have their ships loaded and unloaded; for, as a general rule, people do not load or unload outside a port. Though the loading and unloading of goods is not always the exact measure of a port, it is a safe rule to say that the loading or unloading takes place within the port. If you want to find out how far the port extends beyond the place of loading and unloading, the next test to apply is in what space of water the port authorities exercise authority over ships, and the shipowners and shippers who have ships therein submit to the jurisdiction of the authorities (Brett, M. R., *Sailing Ship Garston Co. v. Hickie*, ante, pp. 588-590; and see per Lord Halsbury, *Hunter v. Northern M. I. C.*, ante, 722; and Lord Herschell, *ibid.* 726).

It may be an open and exposed roadstead (*Sea I. C. v. Gavin*, 1830, 2 Dow & C. 124; and see FINAL SAILING). Under a policy on goods "at and from Lyme to London," goods loaded at Bridport, which is within the legal port of Lyme, and eight miles nearer than it to London, were held not to be covered (*Constable v. Noble*, 1810, 2 Taun. 403; 11 R. R. 617); and goods insured "at and from Carmarthen to London" not to include goods landed at Llanelly, in the legal port of Carmarthen, but having a custom-house of its own (*Payne v. Hutchinson*, 1808, *ibid.* 405; 11 R. R. 620). A policy on goods "at and from a port of lading in North America to London" was held not to cover goods loaded at two ports in New Brunswick lying within seven miles of each other, and in the same arm of the sea (*Brown v. Tayleur*, 1835, 4 Ad. & Ec. 241). Under a war-



ranty "free from capture in port or ports," a ship at anchor off Ghoree, in the river Maas, within the headlands which form the mouth of the river, and captured, is a loss under the policy (*Baring v. Vaux*, 1810, 2 Camp. 541; 11 R. R. 791). Under a warranty "free from capture or seizure in port of discharge," the words "port of discharge" have been held to mean any place where the ship has come to anchor within danger of capture from the land (though the capture be made from the sea), in order to discharge cargo, whether the place be an open roadstead outside a harbour where ships usually unload, or a river, the estuary of a port where the ship is waiting for intelligence; and the underwriters are exempt in such a case (*Dalglish v. Brooke*, 1812, 15 East, 295; 13 R. R. 476; *Oom v. Taylor*, 1812, 3 Camp. 204; *Maydhew v. Scott*, *ibid.* 205; *Jarman v. Crape*, 1811, 13 East, 394; 12 R. R. 374). But if the purpose of the ship's presence there is not to unload, and she is at anchor in the open sea outside the roadstead, the underwriters are liable (*Mellish v. Staniforth*, 1811, 3 Taun. 499; *Levy v. Vaughan*, 1812, 4 *ibid.* 387; 13 R. R. 643; *Keyser v. Scott*, *ibid.* 460; 13 R. R. 721; *Levin v. Newnham*, *ibid.* 722; 14 R. R. 648). Under a warranty "free from confiscation by Government in ship's port of discharge," a ship in Pillau Roads, seized by Prussians and Frenchmen, and condemned as prize at Paris, was held not covered by the warranty (*Levi v. Allnutt*, 1812, 15 East, 267). For the meaning of "in port" or "out of port" by a particular day, see FINAL SAILING; MARINE INSURANCE.

The law relating to the management of ports has already been treated under HARBOURS; but dockyard ports are specially provided for, and require separate notice.

#### PORT (DOCKYARD).

The former powers of the Admiralty for the protection of navigation (given in detail under HARBOURS) were transferred to the Board of Trade in 1862 (25 & 26 Vict. c. 69); but where it appears to the Admiralty that the interests of H.M.'s naval service require that the whole or any part of any harbour, port, bay, estuary, or navigable river, in, on, or adjoining to which there is or shall be any of H.M.'s dockyards, victualling yards, steam factory yards, arsenals, or naval stations, should be excepted out of that transfer, the Admiralty may give notice in writing to that effect to the Board of Trade, and the port, or part of it, remains under the control of the Admiralty (s. 9). Superintendents of H.M.'s dockyards are in all places justices of the peace in respect of offences specified in the Admiralty Powers Act, 1865, and of all matters relating to H.M.'s naval service, and its stores, provisions, and accounts (28 & 29 Vict. c. 124, s. 5). Royal dockyards and naval and military establishments are exempted, so far as watching, lighting, paving, and internal regulations, from the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50, s. 254). Wilful firing of H.M.'s ships or stores in any dockyard is punishable by death (1772, 22 Geo. III. c. 24); and the same penalty is inflicted by the articles of war for setting fire to any dockyard, ship, etc., not being property of an enemy, rebel, or pirate (Art. 34; 1866, 29 & 30 Vict. c. 109). Wilful firing, or attempting to fire, any building belonging to any port, dock, harbour, etc., is a felony punishable by penal servitude (1861, 24 & 25 Vict. c. 97, ss. 4-8).

The following special provisions for dockyard ports are made by the Regulation of Dockyard Ports Act, 1865:—The limits of a dockyard port for the purposes of the Act may be defined by Order in Council (s. 3). A Queen's harbourmaster may be appointed by the Admiralty to superintend the execution of the Act, and protect the port (s. 4).



Port regulations may be made by Order in Council for prohibiting the mooring or anchoring of vessels so as to obstruct the navigation of the port; appropriating a mooring place or anchorage ground for the exclusive use of H.M.'s ships, but the user of such space must not obstruct the navigation of the port; prohibiting the having of gunpowder, or having or firing shotted or loaded guns on board any ship in any specified part of the port, and regulating loading or unloading of gunpowder; restricting the use of fire and light, and the having of tar, oil, or other combustible in a ship in any specified part of the port; prohibiting steam vessels being navigated at a more than specified speed in any specified part of the port; requiring one person at least at all hours of the day and night in every vessel above a specified size placed in any specified part of the port; prohibiting and regulating the breaming of vessels in any specified part of the port; and for other purposes required for the proper protection of H.M.'s ships, dockyards, or property, or the requirements of the naval service (s. 5). Penalties may be imposed by Order in Council for offences against such regulations not exceeding £10 (s. 6). Rules may be made by Order in Council on the joint recommendation of the Admiralty and the Board of Trade, as to the lights or signals to be carried or used, or steps to be taken for avoiding collisions by H.M.'s and other vessels navigating the port and its approaches, which have the same effect as the statutory regulations (see COLLISIONS AT SEA). Copies of such rules are to be sold by the Admiralty, and published in the *London Gazette*, and bind all persons (ss. 8, 9, 10). The Queen's harbourmaster may moor, anchor, place, unmoor, or remove any vessel not moored, etc., by her master according to directions given by the harbourmaster, or left with no one on board her (s. 11); he, or anyone so authorised in writing by the Admiralty, may search any vessel in a dockyard port for gunpowder, loaded guns, fire, light, and combustibles being, or being suspected to be, on board, and may put out such fire or light, and any person obstructing him in the execution of this authority is liable to a fine of £10 (s. 12); he may also remove any wreck or thing obstructing a dockyard port or its approaches, and any floating timber impeding its navigation (s. 13); he may also remove any vessel laid by or neglected as unfit for sea service in any part of a port specified as above, and lay her ashore where this can be done without injury (s. 14). The expenses of removing such wreck or thing or timber or vessel are repayable by its owner; and on failure to pay such expenses, the harbourmaster may sell the wreck, etc., and after repaying the expenses, restore the surplus to the owner, and any deficiency may be recovered from the owner (s. 16). The owner of any vessel or thing compelled to pay any penalty, expenses, sum of money, or costs owing to any act or omission of the master of a vessel, or any other person, may recover it with costs from the person by whose fault such payment had to be made (s. 16). Such penalties, expenses, etc., may be recovered summarily (s. 17); and when recovered, except in the case of a sum recovered by a shipowner from a master or other person, go to the Consolidated Fund (s. 18). Such penalties and expenses and sums of money may be raised, if the master or owner of a ship fail to pay it, by sale of the vessel (s. 19). A summons under this Act may be served by being left on board the vessel for the person intended to be served with the person apparently in charge of the ship (s. 20). For the purpose of jurisdiction every offence against this Act, or any Order in Council made under it, is deemed to arise either in the place where it was committed or where the offender happens to be (s. 21). The jurisdiction of any justice, sheriff, or magistrate abutting on the shore



of the sea, or other navigable water, extends over any vessel near the shore, and every person on board her (s. 22). Nothing in the Act is to prejudice or abridge the rights of any conservancy authority over any part of a dockyard port or its shores and banks (s. 23). No action or proceeding lies against a Queen's harbourmaster, or other person acting under the authority of this Act or Order in Council made thereunder for any irregularity or trespass or act or omission by him, unless notice in writing is given to him a month before proceedings are taken, nor unless the action is begun within six months after the act or omission complained of, or if the damage be continuing within six months after it ceases; and a certain procedure is specified for the action (s. 24). Every Order in Council made under this Act must be laid before both Houses within thirty days of its being made, if Parliament be sitting, or otherwise thirty days after Parliament next meets (s. 26).

[*Authorities*.—Moore, *Foreshore*; Abbott, *Shipping*; Arnould, *Marine Insurance*.]

**Port Charges.**—Where a charter-party provided that if, in consequence of breakdown of machinery, the ship put into a port other than her destination, "port charges and other expenses" were to be borne by the shipowners, it was held that the price of coal supplied at a port of refuge was not included in these words (*The Durham City*, 1889, 14 P. D. 85); but "port charges" in a charter-party have been held to include light dues (*Newman v. Lamport*, 1895, 1 Com. Cas. 161).

**Porters.**—The Company of Porters was the means whereby the Corporation of London exercised its ancient right of measuring all corn, onions, salt, grain, and fruit, and all merchandise, measurable and mete to be measured, brought to the city of London. See METAGE DUES.

The Company was regulated by orders made by the Court of Common Council, and dissolved by an Act of the Council in 1894.

(See Acts of Court of Common Council, 5th October 1620 and 16th May 1681; Midd. and Herts N. & Q. vol. i.)

**Portgreeve; Portreeve.**—Portgerefa, a royal officer who acted as the king's bailiff in trading towns and mercantile places. He was probably elected, though the assent of the king was necessary. His duties were partly judicial, but chiefly consisted in the collection of tolls, customs, and other royal dues before they were let to fee-farm. In the smaller towns it seems also to have been his duty to witness all transactions by bargain and sale. In the charter granted by William I. to London, "William the king greets William the bishop and Gosfrith, the portreeve, and all the burghers within London, French and English, friendly." From the position assigned to the portreeve in this writ, which answers to that given to the sheriffs in ordinary writs, Stubbs says it may be inferred that he was a royal officer who stood to the merchants of the city in the relation in which the bishop stood to the clergy (Stubbs, *Const. Hist.* vol. i. p. 439). The word is derived from Latin *porta* (not *portus*, a haven) and A.-S. *gerefa*, which is in turn derived from A.-S. *rof*, active, excellent, famous, and is not to be connected with German *graf* (Skeat, *Etymol. Dict.*). The system of gerefes pervades the whole



**Anglo-Saxon system.** “Greve autem nomen est potestatis; apud nos autem nihil melius videtur esse quam præfectura” (Laws of Edward the Confessor, c. xxxii.). We hear of scir-gerefa, burhgerefa, portgerefa, wicgerefa, and others; *Est enim multiplex nomen*. When the burgesses began to incorporate themselves to guarantee the king the payment of his dues, and received *firma burgi*, the title gradually disappeared, and that of mayor supplanted it; but it survives in a few places even to this day, notably in Devonshire, in which county at least ten towns, including Tavistock, Holsworthy, and Crediton, have a portreeve for their presiding officer.

[*Authorities.* — Kemble, *Saxons in England*; Stubbs, *Constitutional History of England*, 1883; Gneist, *History of the English Constitution*.]

**Port Helm.**—See COLLISIONS AT SEA.

**Portioner**—A minister who serves a benefice alternately with others, receiving, accordingly, only a proportion of the tithes and profits.

**Portions.**—The rule as to portions was stated by Lord Eldon in the leading case of *Ex parte Pye* (1811, 18 Ves. 140; 11 R. R. 173), that where a parent, or person *in loco parentis*, gives a legacy to a child, not stating the purpose with reference to which he gives it, equity presumes him to give a portion (see the case in White and Tudor’s *Leading Cases in Equity*, pp. 366 *et seq.*): “And by a sort of artificial rule, in the application of which legitimate children have been very harshly treated, upon an artificial notion that the father is paying a debt of nature, and a sort of feeling upon what is called a leaning against double portions, if the father afterwards advances a portion on the marriage of that child, though of less amount, it is a satisfaction of the whole or in part.”

The “doctrine against double portions” above described has been frequently adversely criticised for the hardship it produces. Its application leads not only to SATISFACTION (strictly so called), where a portion is covenanted for, of the portion by a legacy, but also to the ademption of a legacy in the case where, having provided for a child by his will, the father subsequently makes some provision for that child *inter vivos*.

The extent of and reason of the doctrine may be thus stated: “As between father and son the presumption arises that a father does not intend to give double portions to his children; that is to say, if a father has made a provision by way of covenant in favour of his child before the date of his will; then unless it appears upon the will or by parol testimony (which in such cases is admitted in rather an anomalous way in order to rebut the presumption) that he intends to give the benefit conferred by will in addition to that which is already secured to the child by covenant, the child will not take both. In other words, the benefit given by will is presumed to be given on an implied condition that if the son takes it he must give up and surrender that which has been already secured to him by covenant. The same presumption arises, in another form, where the father by his will gives a benefit to a son, and afterwards on his marriage, or upon some other event, makes a settlement upon him; and there again the later provision is considered as an ademption of the previous gift, by will, unless it can be seen, either by parol testimony as to the intention of the father, or by something



appearing upon the documents, that the son is intended to have both" (*Montague v. Earl of Sandwich*, 1886, 32 Ch. D. 525).

Satisfaction and ademption are doctrines embracing other cases besides those of double portions, and for a fuller discussion of the subject the reader should refer to the titles ADEPTION; ELECTION; SATISFACTION; it is beyond the province of the present article to deal with any other doctrine than that of the leaning of Courts of equity against double portions.

Before proceeding further, it should be mentioned that it was formerly considered that for a portion to go in ademption of a legacy it must be something that must satisfy the legacy altogether, and not *pro tanto*. The doctrine that a legacy may be adeemed *pro tanto* by a portion was established by *Pym v. Lockyer* (1839, 5 Myl. & Cr. 29), and is of importance in connection with the question of what gifts may be regarded as portions.

In deciding whether a case comes within the rule against double portions, it is from the circumstances much easier to assume an intention to adeem a legacy by a portion than an intention to satisfy a portion by a legacy; and it is the intention of the testator that must in each case be looked at. In the former, the will comes first, and is revocable at the testator's option; in the latter, there is a binding obligation, which, to be got rid of, must be discharged.

Again, in determining whether the rule applies, the primary question is, What is a portion? It is clear that every sum, no matter how small, cannot reasonably be deemed to be a portion in respect of which the recipient is, under the rule, to account. Accordingly, the sufficiency of the gift and also its purpose must be considered; in the first place, it should be something given by a parent to establish a child in life, to make a provision for him in the ordinary sense of the term, not a mere casual payment for maintenance (*Taylor v. Taylor*, 1875, L. R. 20 Eq. 155). Such provision may be a marriage portion, money to start in business or a profession. "Any sum given by way of making a permanent provision for the child would come within the term 'establishing in life'" (per Jessel, M. R., *Taylor v. Taylor*, *loc. cit.*). The gift need not, however, be cash, *e.g.* a commission and an outfit on entering the army come within the definition, but not payment of passage money. A bequest of a business and of a share of residue are portions (*Vickers v. Vickers*, 1888, 37 Ch. D. 525). And where a testator by his will bequeathed his residue (including a business directed to be sold) for the benefit of his children, and, after making his will, assigned his business to his two sons, the sons' shares in the residue were held to be adeemed, owing to the presumption against double portions, to the extent of the value of the business assigned on trust, and such value had to be brought into account in the distribution of the residue. Other cases of bequests of businesses are *In re Lawes* (1882, 20 Ch. D. 81) and *In re Lacon*, *Lacon v. Lacon* ([1891] 2 Ch. 482). Generally, it may be stated that the reason of the rule against double portions being to give all children equal shares, it applies to gifts of all kinds of property, so long as they are sufficient and may reasonably be supposed to be meant as a provision. But of course the nature of the benefit must be taken into account, for, *e.g.*, nobody would imagine that a father "leaving a diamond necklace to a daughter, would mean that to be a portion" (*Tussaud v. Tussaud*, 1878, 9 Ch. D. 363, 367). A portion is not, however, restricted to a gift of money or money's worth; it is anything which a person *in loco parentis* allots as a provision in discharge of his



obligation, and includes realty as well as personalty (cp. *Taylor v. Taylor*, 1875, L. R. 20 Eq. 155; *Pym v. Lockyer*, *loc. cit.*; *Thynne v. Earl of Glengall*, 1867, 2 H. L. 131; *Russel v. St. Aubyn*, 1876, 2 Ch. D. 398; and see *post*).

Besides the nature and sufficiency of the gift, the limitation of it has sometimes to be considered in the case of gifts to daughters. The cases are summarised in *Tussaud v. Tussaud* (*supra*). They come to this, "that wherever there is a sufficient sum which can reasonably be presumed to be a provision, and wherever it is so settled by the will in the ordinary way, the Courts of equity have said that is a daughter's portion within the rule [against double portions] to the extent of the whole fund." "Settled in the ordinary way" includes not only a settlement to a daughter for life, with power of appointment by will or with remainder to her children, but also where the settlement is to the daughter for life, then the husband for life, and then the children; and the interest of the husband need not be deducted in estimating the portion (*Weall v. Rice*, 1831, 2 Russ. & My. 251; 34 R. R. 83).

The rule against double portions is a presumption of law, and is as such rebuttable by evidence of intention. Such evidence may be intrinsic or extrinsic, and parol evidence to rebut the presumption is admissible, both as regards deeds and wills. The chief instances of intrinsic evidence that rebuts the presumption are—

1. Substantial differences between the two provisions. "Slight differences are such as, in the opinion of the judge, leave the two provisions substantially of the same nature, and every judge must decide that question for himself" (*Lord Chichester v. Coventry*, 1867, L. R. 2 H. L. 71, approving *Weall v. Rice*, *ubi supra*). The question is, are the parties to be benefited and the nature of the benefit substantially different, *e.g.* where a father covenanted with the trustees of his daughter's marriage settlement that his executors should pay, six months after his death, £2000 consols to the marriage-settlement trustees, and subsequently made his will, bequeathing money to trustees upon trust to the daughter for life for her separate use, with remainder to her children, and the settlement contained various trusts in favour of the husband and appointees of the daughter, it was held by the Court of Appeal, in *Tussaud v. Tussaud* (*ubi supra*), that there were such substantial differences between the provisions made by the settlement and by the will as to rebut the presumption against double portions.

2. A difference in the subject-matter of the gift is in itself insufficient to rebut the presumption of satisfaction or ademption. Shares of residue and bequests of businesses, or taking a son into partnership, have been all held to be in satisfaction of other obligations. The case of *Bengough v. Walker* (1808, 15 Ves. 507; 10 R. R. 106—share of a business in satisfaction) has been followed in the cases of *Lawes v. Lawes* and *In re Vickers* (*ubi supra*). And although in the former case the decision was given without touching upon the question "whether, having regard to recent decisions, a pecuniary portion can be satisfied by a gift not of money but of money's worth" (20 Ch. D. at p. 86), inasmuch as the capital in the business with which the son was credited exceeded the amount of the obligation, and in some of the earlier cases the putting of a monetary value on the property by the father, or person *in loco parentis*, is spoken of as a requisite for the presumption of satisfaction to arise, we apprehend that this distinction is not now recognised, at all events where "there does not seem such a want of harmony in the subject-matter



of the gift in the will and the subject of the gift in the deed, or such incongruity between the two things as to create a difficulty in saying that the one cannot be taken in satisfaction for the other" (North, J., in *Vickers v. Vickers*, 1888, 37 Ch. D. at p. 532, a case wherein there was admittedly a handing over of the whole business, whatever its value, and not one where the donor could be said to have ascertained or estimated the value of the gift). And in *In re Lacon* (*loc. cit.*) Romer, J., said—

But then it is said that admitting this to be a gift, yet, to come within the law regarding the ademption and satisfaction of portions, a gift must be of money or of some property, the monetary value of which had been pointed out or fixed by the donor. In my judgment this contention cannot be supported. I know of no principle on which a distinction can be drawn, for the purpose of considering what is a portion, between a gift of money and a gift of any other kind of property, and I know of no authority supporting the contention. On the contrary, the cases show that gifts of shares of residue, of shares in partnership property, and of real estate, have been considered and treated as portions.

But a portion necessarily implying a bounty, if the element of consideration can be shown to exist in either of the transactions the doctrine of double portions has no application. And in *Lacon v. Lacon* (*loc. cit.*) it was for this reason that the doctrine was held not to apply, the son in this case claiming to be a purchaser for value of the shares which had been given him in the business of his father. The son having for many years managed the business, the father, on his asking for an increase of salary, gave him two shares in the business, and the Court held that, assuming the two shares which the son received in the testator's lifetime were given him by way of portion, the presumption against double portions was rebutted by the circumstances under which he received them, which showed that the testator intended him to have a greater share in the business than his brothers.

But, *semble*, the two shares were not intended as a portion, but as remuneration for his services as manager, and the rule against double portions would not be applicable even primarily.

The authorities are not clear as to who is a person *in loco parentis*. In the cases referred to above the person in question has been the father. The subject has not in more recent years been considered till quite lately in the case of *In re Ashton, Ingram v. Papillon* ([1897] 2 Ch. 574; [1898] 1 Ch. 141), where Stirling, J., adopted Lord Eldon's definition in *Ex parte Pye* (*loc. cit.*)—

A person meaning to put himself *in loco parentis*—in the situation of the person described as the lawful father of the child. But this definition must, I conceive, be considered as applicable to those parental offices and duties to which the subject in question has reference, namely, to the office and duty of the parent to make provision for the child. The offices and duties of a parent are infinitely various, some having no connection whatever with making a provision for a child; and it would be most illogical, from the mere exercise of any such office or duties by one not the father, to infer an intention in such person to assume also the duty of providing for the child.

And the question as to who is *in loco parentis*, where the person concerned is other than a father, being one of intention, the index to, though not conclusive proof of, such an intention, is the manner in which that person has acted, *e.g.* if the person's conduct is such as to raise a moral obligation to provide for the donee, the presumption would be that he is *in loco parentis*; if, on the other hand, the child lives with its father and is maintained by him, the inference against any other person being *in loco parentis* is very strong. Accordingly, where a donee of a special



power to appoint amongst her children, grandchildren, and other issue, in exercise of that power by her will directed the trustees to divide the fund equally among her three children, and subsequently by deed irrevocably appointed one-third to one of her children, it was held that the rule against double portions did not apply, and that the child to whom the appointment was made by deed might share equally with the other two under the will. After referring to Lord Eldon's definition, and remarking on the transition therein from the word "parent" to the word "father" without making any distinction between the two terms, Stirling, J., thus gives the reason of his decision:—

*Primâ facie* the duty of making a provision for a child falls on the father, but may fall on or be assumed by some other person. I do not say that in no case and under no circumstances can the duty fall on or be assumed by the mother of the child; but it appears to me that the burden of proving such to be the case lies on those who assert the fact so to be. In the present case the mother was distributing a fund derived under the will of her own father; and there is no evidence that either she or her father undertook the discharge of any such duty. In my judgment, the rule under the circumstances does not apply (*In re Ashton, Ingram v. Papillon*, [1897] 2 Ch. 574, 578).

This case has been reversed on the evidence only by the Court of Appeal, it appearing that the child in question had, as a fact, accepted the appointment by deed in prepayment or anticipation of her third share under the will; but the question of law dealt with by Stirling, J., as to the application of the rule against double portions, was not discussed, the case being treated as equivalent to that of a legacy given by will of a sum of money and of payment by the testator in his lifetime to the legatee in anticipation (S. C., [1898] 1 Ch. 143).

**Portmen** are the burgesses of Ipswich and the Cinque Ports; and a *portmote* is a Court held in haven towns or ports, and sometimes in inland counties (Lely, *Dictionary*).

**Portrait.**—A portrait is generally defined to be the painting, drawing, or engraving of the likeness of a person, or even sometimes of an animal, in a vivid or graphic manner. The word comes through the French from the Latin *pertrahere* or *pertractare*, and therefore implies some degree of completeness or perfection or similitude to life, which quality will distinguish a portrait from a mere sketch or caricature. So the terms "portrait bust" or "portrait statue" are used as distinguished from "ideal bust" or "ideal statue." The usual form of portrait represents a person's head and shoulders, but the term equally applies to greater lengths and to figures with accessories, provided the figures are the main subjects. Sir Joshua Reynolds says: "In portraits the grace, and we may add the likeness, consists more in the general air than in the exact similitude of every feature." A photographic likeness, therefore, though sometimes spoken of as a portrait, is not, properly speaking, such. History pieces, too, such as battle scenes, though containing likenesses of real persons, are not portraits, because the likenesses are not the main object of the picture. A painting of a figure on horseback, however, which forms its main feature, even though several other objects also appear thereon, is a portrait (*Duke of Leeds v. Earl Amherst*, 1844, 14 L. J. Ch. 73).

Portraits will, as a rule, come within the protection afforded to



paintings, drawings, and the designs thereof, and photographs under the Copyright (Works of Art) Act, 1862, 25 & 26 Vict. c. 68. So the reproduction of a crayon drawing made from part of a photograph of the Princess of Wales was held to be an infringement of the copyright in the photograph (*London Stereoscopic Co. v. Kelly*, 1888, 5 T. L. R. 169); and where *The Sketch* published a reproduction of a drawing made on a larger scale from the photograph of a tiger, it was held also to be a breach of copyright (*Bolton v. Aldin*, 1895, 65 L. J. Q. B. 120). But if there is sufficient variation no breach will be committed, as if sketches are made of *tableaux vivants* representing well-known paintings, where, at all events, the faces, etc., must be different (*Hanfstaengl v. Baines & Co.*, [1895] App. Cas. 20).

**Portsale.**—Auctions, or public sales of goods to the highest bidder, taking place in ports, were formerly so called. The term seems particularly applicable to sales of fish “on the stone,” as soon as brought into harbour (cp. 25 Hen. VIII. (1533), c. 4, repealed by 35 Hen. VIII. (1543), c. 7).

**Port Sanitary Authority.**—This is a body intrusted with the duty of providing for the public health of a port; and its constitution, duties, and liabilities are regulated by the Public Health Act of 1875.

The Local Government Board may by provisional order permanently constitute any local authority whose district, or any part thereof, forms part of or abuts on any part of a port in England or the waters of such port, or any conservators, commissioners, or other persons having authority there (referred to in the Act as a riparian authority), the sanitary authority of the whole or part of such port (referred to in the Act as a port sanitary authority). The Board may also similarly permanently constitute a port sanitary authority for the whole or any part of a port by combining any two or more riparian authorities having jurisdiction in such port (and prescribe the mode of their joint action), or by forming a joint board, consisting of representative members of any two or more riparian authorities, in the same way as the Act provides for the formation of a united district. It may also similarly permanently constitute a port sanitary authority by forming a joint board, consisting of representative members of all or any of the riparian authorities having jurisdiction in such ports or part thereof. In any case, where the Board can do this, it can, till such order has been confirmed by Parliament, temporarily constitute by order any such authority, and from time to time renew such order, and by any order so made or renewed make any provisions that it can under this section make by provisional order. Any order constituting such an authority may assign to it any powers, rights, duties, capacities, liabilities, and obligations, and direct how its expenses are to be paid; where such order constitutes a joint board such an authority, it may contain regulations with respect to any matters for which regulations may be made by provisional order forming a united district under this Act.

A port in this Act means a port as established for customs purposes (s. 287).

The order of the Board constituting such an authority gives it jurisdiction over all waters within the limits of the port, and also over the whole or a specified part of the district in the jurisdiction of any riparian authority (s. 288). Such an authority may, with the sanction of the Board,



delegate the exercise of its powers to any riparian authority in or bordering on their district, but only to the extent of that order (s. 289). Any expenses which a port sanitary authority temporarily constituted incurs in carrying into effect the purposes of the Act are defrayed out of a common fund contributed by riparian authorities in proportions decided on by the Board. If it is a local authority, such an authority may raise its proportion of expenses in the same way as it can raise funds for expenses incurred by it in any way for the purposes of the Act. To obtain payment from contributing riparian authorities, the port sanitary authority issues precepts to them; any contribution payable by a riparian authority is a debt due from it, and may be recovered accordingly, and such contributions in the case of a rural authority are deemed general expenses of that authority. In case of default, the port sanitary authority may, instead of or in addition to proceeding for recovering the debt, proceed summarily under the Act to raise in the district of the defaulting authority a sum sufficient to pay the debt. Where several riparian authorities are combined in the district of one port sanitary authority, the Board may, by order, exempt one or more of them from contributing to their own expenses (s. 290).

Where a port sanitary authority is authorised to proceed summarily to raise the amount of a debt in the district of a defaulting authority, it has all the powers which that authority would have in respect of expenses properly incurred by it, such as levying the money by rate by its officers or by precept; such precept may be for an amount exceeding the debt (but not by more than 10 per cent.), so as to include the expenses of collection, and any balance over is rendered to the defaulting authority (s. 292). Existing port sanitary authorities and their establishments are continued by the Act, and are subject to it, with a saving of their previous rights (s. 326). Port sanitary authorities may borrow on the credit of any fund or rate applicable by them to the purposes of the Act, or on the credit of their sewage land or plant; and the Public Loans Commissioners may make them loans on the terms requisite in the case of local authorities (s. 244).

By the amending Act of 1885 (48 & 49 Vict. c. 35), it is provided that the Local Government Board may permanently constitute such authorities by order in cases where they could do so by provisional order. Every such order comes into operation on a day fixed thereby, unless it is objected to by a riparian authority, who would thereby contribute to the expenses of the new authority, within a specified time, in which case it becomes a provisional order, and does not take effect till confirmed by Parliament; and the Board may repeal, alter, or amend, by subsequent order, any such order not so made provisional (s. 3).

The port sanitary authority for the port of London is the corporation, which pays its expenses out of its corporate funds, and is given all the powers of such an authority by the Board (1891, 54 & 55 Vict. c. 76, ss. 111, 112); and among its duties is seeing that engines and furnaces in steam vessels in the Thames, above London Bridge, or plying between that bridge and any place west of the Nore Light, consume their own smoke, and failure to comply with this regulation entails a penalty on the owner or master of the vessel (s. 23).

[*Authority.*—Glen, *Public Health.*]

**Positive Law.**—See JURISPRUDENCE.



**Posse comitatus.**—It is the duty of every person in a county to be ready and apparelled, at the command of the sheriff and the cry of the county, to arrest felons, whether within franchise or without; and default entails fine. This was declared the law in 1275 (Stat. West. Prin., 3 Edw. I. c. 9), and continues to the present day (50 & 51 Vict. 35, s. 8 (1)). It applies, irrespective of the existence of writs or warrants (see ARREST); but owing to the establishment of the county police, the sheriff does not now pursue or arrest felons in England, though the old practice continues in the United States.

Where the sheriff finds any resistance in the execution of any writ, he is bound to take with him the power of the county (*i.e.* all men whom he chooses between fifteen and seventy), and to go in proper person to do execution, and may arrest the resisters and commit them to prison; and resistance is a misdemeanour (50 & 51 Vict. c. 55, s. 8 (2); and see *R. v. Brown*, 1841, 1 Car. & M. 314). This was declared the law in 1285 (Stat. West. 2, 13 Edw. I. c. 39), and continues to the present day.

The use of the *posse comitatus* is now very rare in England, but common in the United States, and occasional in Ireland. It is not called out unless the sheriff found resistance or thought it likely (*Foljambe's case*, 1601, 5 Co. Rep. 115 b).

The existence of the power to use the *posse comitatus* makes it no answer by the sheriff, for non-execution of a writ, to say that he was deforced or resisted.

The police in a county form part of the power of the county, and it is illegal to refuse their assistance if the sheriff demands it (*A.-G. v. Kissane*, 1893, 32 L. R. Ir. 220, 255, in which case and *Miller v. Knox*, 1838, 4 Bing. N. C. 574; *R. v. Pinney*, 1832, 2 St. Tri. N. S. 354, 526; and *R. v. Vincent*, 1839, 9 Car. & P. 91, it is stated that justices of the peace are entitled to call out the *posse comitatus*). See RIOT.

[*Authorities.*—2 Co. Inst. 193; 3 Co. Inst. 163; Dalton, *Sheriff*, p. 354; Vin. Abr. tit. "Sheriff" (B); Bacon, *Abr.* "Sheriff" (N); Mather, *Sheriff Law*.]

## Possession.

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*Distinction between Actual and Legal Possession.*—The question has been much discussed whether possession is a fact or a right. Primarily, the term denotes a state of fact, which may be shortly described as exclusive physical control, but this state of fact carries with it legal advantages, and so is the source of rights. If the state of fact could always be ascertained with certainty, and if it always produced the normal legal effect, the subject of possession would present little difficulty; but neither supposition is true. It is frequently uncertain to whom the actual control of a thing is to be attributed, and, when this question is settled, the law may credit the advantages of possession to some person other than the apparent possessor.



Or it may credit these advantages to a particular person, although the possession is disputed or is vacant. Hence arises the distinction between actual and legal possession. Actual possession denotes the state of fact; but the person to whom are credited the advantages of possession has the legal possession, whether he is the actual possessor or no. Legal possession, again, must be distinguished from lawful possession. Lawful possession is the possession of one who has a good title to possess; but a wrongful possession may be recognised as the foundation of legal advantages, and may therefore be a legal possession within the meaning of the phrase as just used. Legal possession, when not accompanied by possession in fact, is known as "possession in law."

A few examples will make the distinction clear. Ordinarily, actual and legal possession coincide. An occupying tenant of a house has the actual possession of the house, and can maintain trespass against an intruder; in other words, he has the legal possession as well. But if the occupier is a servant of the owner, he has only the actual possession; the legal possession is in his master, in whose name an action of trespass must be brought. If two men are present on a field, each claiming the possession, until one has prevailed the actual possession is undecided; but if either of them is entitled to the possession, the legal possession follows the title. Treasure hidden in a field, of which the possessor of the field is not aware, is, perhaps, in fact in the possession of no one, but the legal possession is not allowed to be vacant, and it is attributed to the possessor of the field. The following pages will furnish the authorities for these instances, and also for other cases in which the law either overcomes the doubts which attend actual possession, or boldly recognises possession as existing for legal purposes, although such recognition is in direct conflict with the actual fact. Possession is a matter of too great consequence in determining legal rights for it to be left in suspense, because the fact of physical control is doubtful, or even is entirely wanting.

*Nature of Possession.*—Possession is usually said to consist of two elements—physical control and intention to possess; but in English law the latter element does not assume the same prominence as, in the shape of the *animus domini*, it has been thought to assume in Roman law. Ordinarily, it is implied from the acts which evidence physical control, and even the circumstance that it does not in fact exist, as in the case of concealed treasure, does not prevent legal possession from arising. The general rule of English law is that exclusive physical control gives legal possession, unless the apparent possessor holds only as servant or bailiff on behalf of another. The determining factors in legal possession are, then, the exercise of exclusive physical control, and the character in which this control is exercised. The facts which are taken to show exclusive physical control vary according as the subject-matter of the possession is land or goods.

*Possession of Land.*—Possession is shown in the case of land by suitable acts of ownership done upon the land to the exclusion of other persons claiming possession.

*Acts of Ownership.*—"When the object, as a whole, is incapable of manual control, and the question is merely who has *de facto* possession, all that a claimant can do is to show that he, or some one through whom he claims, has been dealing with the object as an occupying owner might be expected to deal with it, and that no one else has done so. *Omnia ut dominum gessisse* (C. 7. 32, *de poss.* 2) is, for English as well as for Roman lawyers, a good working synonym of *in possessione esse*" (Pollock and



Wright, *Possession*, p. 30). It follows that the acts which will establish possession vary according to the character of the land, and if it is not capable of ordinary beneficial occupation, as if it is moorland or foreshore, slight acts of ownership will be sufficient to establish possession, at any-rate in favour of persons who, by virtue of being adjacent owners, may not improbably be entitled to possession. "By possession is meant possession of that character of which the thing is capable" (*Lord Advocate v. Young*, 1887, 12 App. Cas. p. 556). Hence, in the case of uncultivated land, shooting over the land may be a sufficient act of ownership (*Harper v. Charlesworth*, 1825, 4 Barn. & Cress. 574, 584; 28 R. R. 405); and in the case of foreshore, such acts as taking sand or erecting groynes are important (see FORESHORE).

It is not necessary to prove acts of ownership over the whole of the area of which possession is claimed. Acts done upon one part of a tract of land are evidence of possession of the whole, provided there is such a common character of locality between the various parts as to make it a reasonable inference that the owner of the part is the owner of the whole (*Jones v. Williams*, 1837, 2 Mee. & W. p. 331; *Lord Advocate v. Lord Blantyre*, 1879, 4 App. Cas. p. 791). This inference is easily raised in the case of an enclosed area. "In ordinary cases, to prove his title to a close, the claimant may give in evidence acts of ownership in any part of the same enclosure, for the ownership of one part causes a reasonable inference that the other belongs to the same person" (per Parke, B., in *Jones v. Williams*, *supra*). But the area in question may be naturally defined, as where it is a belt of trees (*Stanley v. White*, 14 East, 332; 12 R. R. 544), or may be mapped out by the acts of ownership themselves.

*Exclusive Occupation.*—To constitute possession of land, the acts of ownership must be exclusive, that is, there must be no other persons exercising rights of ownership or claiming possession adversely to the alleged possessor (Holmes, *Common Law*, p. 235; see *Revett v. Brown*, 1828, 5 Bing. 7; 30 R. R. 526). Two persons, however, may have a joint possession (*Ward v. Ward*, 1871, L. R. 6 Ch. 789). The requirement of exclusive user has sometimes been stated in such terms as to imply that there must be power to exclude all foreign interference (Savigny, *Possession*, Sir Erskine Perry's translation, p. 147); but this is not correct. It is sufficient that foreign interference is in fact excluded. "That occupation is effective which is sufficient as a rule, and for practical purposes, to exclude strangers from interfering with the occupier's use and enjoyment" (Pollock and Wright, *Possession*, p. 13). Enclosure, by fences or otherwise, is the usual mark of exclusive possession (*Coverdale v. Charlton*, 1878, 4 Q. B. D. p. 118; *Seddon v. Smith*, 1877, 36 L. T. 168), but this is not necessary. The question is whether other claimants are in fact excluded. Moreover, the requirement must not be pressed too far, and, especially in the case of foreshore, absolute exclusion is not to be looked for. "The proprietor cannot exclude the public from it at any time, and it is practically impossible to prevent occasional encroachments on his right, because the cost of preventive measures would be altogether disproportionate to the value of the right" (per Lord Watson in *Lord Advocate v. Young*, 1887, 12 App. Cas. p. 544).

In numerous cases, acts of ownership which, *prima facie*, would show possession, fail of this effect because they are not exclusive. A lodger who has separate rooms in a house is not deemed to have possession if the duty of attending to the rooms devolves upon the landlord or his servants (*Smith v. St. Michael, Cambridge*, 1860, 3 El. & El. 383; see per Blackburn,



J., in *Allan v. Liverpool*, 1874, L. R. 9 Q. B. p. 191). Otherwise, if the lodger takes care of the rooms himself (*Lane v. Dixon*, 1847, 3 C. B. 776). A licence is distinguished from a lease, on the ground that it does not confer exclusive possession (*Taylor v. Caldwell*, 1863, 3 B. & S. p. 832). The inference of possession that would be raised from the pasturing of cattle is rebutted if the pasturing is done in the exercise of a right of cattlegate, which does not require exclusive possession (*Rigg v. Earl of Lonsdale*, 1857, 1 H. & N. 923). And so cricket elevens have no possession of the field in which they are playing at the invitation of the owner (*Holmes v. Bagge*, 1853, 1 El. & Bl. 782). On the other hand, if an owner has given up land for purposes which practically require exclusive occupation, as to dig for coprolites, he does not retain possession by reserving the right to enter and inspect (*Roads v. Trumpington*, 1870, L. R. 6 Q. B. 56).

*Possession of Goods.*—In the case of goods, possession may take the form of actual grasping or detention, and so admits of being established with the utmost certainty. On the other hand, it has to be admitted where actual grasping is absent, and the element of physical control is almost if not quite non-existent. Possession may then be regarded as the result of a special rule of law (see Pollock and Wright, *Possession*, p. 37). In principle, the requirements of possession are the same as in the case of land, namely, physical control to the exclusion of others, and ordinarily the test is applied strictly in the case of wild animals. Fresh pursuit does not give possession. There must be an effective capture (*Holmes, Common Law*, 217). So it has been held that fish taken in a seine are not reduced into possession so long as the net remains open (*Young v. Hitchens*, 1844, 6 Q. B. 606). All but reducing into possession is not the same as reducing into possession. On the other hand, in the whale fishery special customs regulate the possession of whales without the necessity of completing the capture (*Fennings v. Lord Grenville*, 1808, 1 Taun. 241; 9 R. R. 760; *Littledale v. Scaith*, 1788, *ibid.* 243 n.).

Where goods are placed in a building they are deemed to be in the custody of the possessor of the building, at least where the building is not open to the public. Where it is open to the public, it is necessary to inquire into the mode in which the goods have come there. In *Bridges v. Hawkesworth*, 1851, 21 L. J. Q. B. 75, a parcel of bank notes was dropped on the floor of a shop, and it was held that they did not thereby pass into the custody of the shopkeeper. Consequently, a person who found them was entitled as against the shopkeeper. The notes, it was said, were not within the protection of the shopkeeper's house. But where a customer lays his pocket-book on the counter of a bank, or on a table in a shop, and forgets to take it away, it seems the result may be different (*Kincaid v. Eaton, M'Avoy v. Medina*, referred to in *Holmes, Common Law*, 222). The rule that the possession of a house carries with it the possession of goods inside applies to land generally (see *R. v. Rowe*, 1859, Bell's C. C. 93). Hence the possessor of land has been held to be in possession of a pre-historic boat found embedded in the soil (*Elwes v. Brigg Gas Co.*, 1886, 33 Ch. D. 562). In such a case, there is no specific intention to possess, such as was required in Roman law, and either the intention must be implied from the general intention to exclude strangers from the house or land, or it must be taken to be a positive rule of law that the possession of real estate carries with it the possession of all chattels situate thereon (Pollock and Wright, *Possession*, p. 41). In other words, the intention is not regarded. It is sufficient that the exclusion from the land, as a general rule, of



strangers, secures their exclusion also from interference with the chattel. In *R. v. Rowe* (*supra*) the property in iron, taken by a stranger from the bottom of a canal, was held to be well laid in the canal company, thereby implying that the legal possession was in the company; and this was held by Chitty, J., in *Elwes v. Brigg Gas Co.* (*supra*), to be conclusive as to the possession of the prehistoric boat. "The boat was embedded in the land; a mere trespasser could not have taken possession of it, he could only have come at it by further acts of trespass, involving spoil and waste of the inheritance."

The presumption of law was carried to its full extent in the recent case of *South Staffordshire Water Co. v. Sharman*, [1896] 2 Q. B. 44. There the defendant, while cleaning out under the plaintiffs' orders a pool of water on their land, found two rings. Nothing was known as to the ownership of the rings, and the defendant refused to deliver them to the plaintiffs. In an action of detinue they established their right to recover the rings by virtue of the prior possession, and the rule of law as to the possession of chattels found upon land was laid down by Lord Russell, C.J., Wills, J., concurring, as follows: "The general principle seems to me to be that where a person has possession of a house or land, with a manifest intention to exercise control over it, and the things which may be upon or in it, then, if something is found on that land, whether by an employee of the owner or a stranger, the presumption is that the possession of that thing is in the owner of the *locus in quo*." And *Bridges v. Hawkesworth* (*supra*) was distinguished on the ground already adverted to, that in that case the notes were dropped in a public part of the shop, and there was not that actual exclusion of strangers upon which *de facto* possession is founded.

In the case both of land and goods, the legal possession is not attached to the actual possession if the possessor holds in the character of bailiff or servant for another (*Bertie v. Beaumont*, 1812, 16 East, 33; *White v. Bayley*, 1861, 10 C. B. N. S. 227; *Mayhew v. Suttle*, 1854, 4 El. & Bl. 347). Similarly, a person holding land as a tenant for years is denied the special form of legal possession known as seisin. The English law, however, differing herein from the Roman law, does not refuse legal possession to bailees (Holmes, *Common Law*, p. 211).

*Acquisition of Possession.*—The preceding statements as to the nature of possession indicate the various requirements for its acquisition, transfer, and loss. The original acquisition of possession (OCCUPATION) does not often come into question. In the case of land in England it can only occur under exceptional circumstances (see Pollock and Wright, *Possession*, p. 45). In the case of chattels, the most usual case is the capture of wild animals (*ibid.* p. 124). The acquisition is complete as soon as possession has been effectively obtained, though sometimes, as in the cases of the whale fishery already referred to, the law intervenes with a positive rule in order to prevent strife.

*Transfer of Possession.*—Transfer of possession may take place either with the consent of the existing possessor (delivery of possession) or against his consent (dispossession). The distinction is important with respect to the effect ascribed in law to the physical elements in possession. Slight acts of control will be sufficient to vest the possession in a new possessor when he takes with the consent of the former possessor. He gets, it has been said, the goodwill of his predecessor's occupation (Pollock and Wright, *Possession*, p. 14). On the other hand, in a case of dispossession, no presumption arises in favour of the new possession (unless the new possessor enters under title), and the new possessor must make good his



occupation. "Delivery is favourably construed, taking is put to strict proof; and this, not by calling in aid any presumption of right, but on the ground that the reality of *de facto* dominion is measured in inverse ratio to the chances of effective opposition" (*ibid.*).

*Delivery.*—Formerly delivery of possession, in the form of livery of seisin, was an essential element in the conveyance of land (see FEOFFMENT), and it was effected either by actual entry on the land (livery in deed) or in sight of the land (livery in law) (*Co. Litt.* 48 *a, b*); in the latter case the possession was not complete till the entry of the new possessor, and in both cases it was necessary that there should be no other person present claiming ADVERSE POSSESSION (*Doe v. Taylor*, 1833, 5 Barn. & Adol. 575). The immediate freehold now lies in grant (8 & 9 Vict. c. 106, s. 2), and livery of seisin has become practically obsolete; but in order that a new possessor may be able to maintain trespass, it is still necessary that he should have actually entered on the land (*Ryan v. Clark*, 1849, 14 Q. B. p. 73; *Harrison v. Blackburn*, 1864, 17 C. B. N. S. p. 691). Upon such entry his possession will be deemed to extend to the whole area which the former possessor intended to deliver to him (*Low Moor Co. v. Stanley Coal Co.*, 1876, 34 L. T. 186).

Delivery of goods may take place by actual delivery to the transferee or his servant, and in this case there is no difficulty. But it may also be effected by placing the goods under the control of the transferee without actually putting them into his hands. Under this head falls the so-called symbolical delivery, as where the keys of a warehouse are delivered with the intention of delivering possession of the goods in the warehouse. The correct view appears to be that such delivery is not merely symbolical, but depends upon the transferee having obtained, by delivery of the key and the voluntary withdrawal of the transferor, the actual control of the goods. The delivery, it was said by Lord Hardwicke in *Ward v. Turner* (1752, 2 Ves. 431), is not a mere symbol; "delivery of the key of bulky goods, where wines, etc., are, has been allowed as delivery of possession, because it is the way of coming at the possession or to make use of the thing; and therefore the key is not a symbol, which would not do." It is the same where goods are contained in a locked box. Delivery of the key will operate as a delivery of the goods; but if the owner delivers the box and keeps back the key, it has been held that the contents of the box are not delivered (*Reddel v. Dobree*, 1839, 10 Sim. 244).

The principle that one person may hold goods on behalf of another, the legal possession being then attributed to the latter, enables delivery of goods to be made by attornment. Thus, if A., who is in possession of goods, sells them to B., and agrees to hold them on his behalf, this operates as a delivery to B. (*Elmore v. Stone*, 1809, 1 Taun. 458; 10 R. R. 578). So if C. has the custody of goods on behalf of A., and A. wishes to deliver them to B., this is effected by C. agreeing to hold on behalf of B. But for this purpose the mere delivery by A. to B. of the indicia of title, such as a transfer order, is not sufficient. The order must be lodged with C., and accepted by him (*Castle v. Sworder*, 1861, 6 H. & N. 828).

*Entry under Title.*—In matters turning upon possession, the English law does not exclude the question of title. On the contrary, it accepts title as conclusive of the question of possession, and notwithstanding that the actual possession is in dispute, it awards the legal possession to whichever of the two claimants has the better title to possess (*Reading v. Royston*, 1702, Salk. 423). Hence, if there are two persons in a field, each asserting that the field is his, and doing some act in assertion of his right, "the



person who has the title is in actual possession, and the other is a trespasser" (*Jones v. Chapman*, 1847, 2 Ex. Rep. p. 821, per Maule, J.). And slight acts of possession will be sufficient to bring the principle into play, and to vest the legal possession in the person entering with title (*Lows v. Telford*, 1876, 1 App. Cas. 414).

*Dispossession.*—When a stranger enters upon land without title, the law makes no presumption in favour of his possession, and, although the legal possession vests in him, this depends solely upon his effective occupation of the land, and does not extend beyond the area of effective occupation. Moreover, an occupation which might be effective for the purpose of giving the intruder possession as against another stranger, and the right to bring trespass for a disturbance of his possession, does not necessarily give possession as against the person who has been dispossessed. "A mere trespasser cannot by the very act of trespass, immediately and without acquiescence, give himself what the law understands by possession against the person whom he ejects, and drive him to produce his title, if he can without delay reinstate himself in his former possession (*Browne v. Dawson*, 1840, 12 Ad. & E. 624, per Lord Denman, C.J.). In that case, an occupation of seven days was held not to give the intruder a right to maintain trespass against the previous possessor who had re-entered and ejected him (see *Scott v. Brown & Co.*, 1885, 51 L. T. 746).

For the purpose of the Statute of Limitations, time runs against an owner of land from the date when he either is dispossessed or discontinues the possession (Real Property Limitation Act, 1833, s. 3). Discontinuance, however, does not mean simply the abandonment of possession. There is no interruption of the possession for this purpose unless the abandonment of possession by one person is followed by the actual possession of another person (*M'Donnell v. M'Kinty*, 1847, 10 Ir. L. R. p. 562; *Smith v. Lloyd*, 1854, 9 Ex. Rep. 562; *Trustees' Agency Co. v. Short*, 1888, 13 App. Cas. p. 799). In determining whether dispossession has taken place, the principles already enunciated apply, but regard must be paid to the fact that possession of land is often maintained by slight acts of user. On the other hand, an adverse possession must be shown by definite acts of occupation. Hence acts of temporary user, not inconsistent with the owner's enjoyment of the soil for the purpose for which it was intended—as where it was being kept as the site for an intended street—do not amount to dispossession (*Leigh v. Jack*, 1879, 5 Ex. D. 264; see *Tottenham v. Byrne*, 1861, 12 Ir. R. C. L. 376). Questions of dispossession not infrequently arise in determining boundaries; and an encroachment may be made upon a strip of adjacent land, provided the occupation of it is clear (*Norton v. L. & N.-W. Rwy. Co.*, 1879, 13 Ch. D. 268); though the rights of the adjoining owner will not be allowed to be easily taken away, if from the nature of the ground he could have been expected to do very little to show his ownership (see *Searby v. Tottenham Rwy. Co.*, 1868, L. R. 5 Eq. 409; and as to the possession of boundary walls, see *Stedman v. Smith*, 1857, 8 El. & Bl. 1; *Phillipson v. Gibbon*, 1871, L. R. 6 Ch. 428; *Waddington v. Naylor*, 1889, 60 L. T. 480). The filling up of a gravel pit and cultivation of the site will give possession, so as to make the statute run against the owner (*Smith v. Stocks*, 1869, 17 W. R. 1135), but in an open quarry adverse possession extends only to the part which is worked (*M'Donnell v. M'Kinty*, 1847, 10 Ir. L. R. 514); and in the case of a mine, it seems a stranger cannot gain possession except of the part which he actually marks out, as by driving levels (*Ashton v. Stock*, 1877, 6 Ch. D. 719; see *Low Moor Co. v. Stanley Coal Co.*, 1876, 34 L. T. 186).



The same principle applies in regard to moveables, and a man who is not entitled to take possession can, it has been said, obtain possession only of that which he actually lays hold of (*Ex parte Fletcher*, 1877, 5 Ch. D. 809). Where an entry was made on behalf of a bill of sale holder in order to terminate the apparent possession of the grantor, it was held that this was effected by the person entering being in a position to exclude the grantor, although by reason of the goods being locked up he could not get at them (*Furber v. Finlayson*, 1876, 24 W. R. 370).

*Abandonment of Possession.*—The distinction between possession with and without title is important also in relation to the abandonment of possession. It is usually said that possession continues so long as the possessor is able to reproduce at will the physical control upon which his acquisition of the possession was founded, but, in the case of land, if he is a mere intruder, it is clear that something more than the mere power to resume occupation is necessary to preserve his possession. A trespasser who enters upon and occupies land will not be deemed to remain in possession if he quits the land and leaves behind him no indication that he means to return (see *Worrsum v. Vandenbrande*, 1868, 17 W. R. 53); and, after he has thus abandoned possession, it seems that the legal possession reverts in the former possessor without fresh entry (*Trustees' Agency Co. v. Short*, 1888, 13 App. Cas. 793). "If a person enters on the land of another, and holds possession for a time, and then, without having acquired title under the statute, abandons possession, the rightful owner on the abandonment is in the same position in all respects as he was before the intrusion took place" (*ibid.*). And so a possession held under title, which is not being maintained by any actual user, will cease upon the cessation of the title (*Brown v. Notley*, 1848, 3 Ex. Rep. 219). On the other hand, so long as the title continues, the legal possession will remain in the person entitled, notwithstanding his want of occupation, until possession is actually taken by a stranger. It has been doubted, indeed, whether it is competent for an owner, even by intentional abandonment, to divest himself of legal possession (Pollock and Wright, *Possession*, p. 124).

*Possession as a Source of Title.*—Mere possession is protected in trespass as against an intruder who cannot show title in himself or in some person by whose authority he enters. It is no defence that he shows title in another unless he also has the authority of that other (*Chambers v. Donaldson*, 1809, 11 East, 65, overruling *Trevilian v. Pyne*, 1700, 1 Salk. 107). In other words, the defendant in an action of trespass cannot set up the *jus tertii*. To maintain the action, however, the plaintiff must show that he was in possession at the time when the trespass was committed (*Hodson v. Walker*, 1872, L. R. 7 Ex. p. 69). And a right to possession will not suffice; consequently a lessee cannot maintain trespass till he has entered (*Wheeler v. Montefiore*, 1841, 2 Q. B. p. 142). An exception exists, however, in the case of a lessor at will, who, as well as the lessee, can maintain trespass against a wrong-doer (Pollock and Wright, *Possession*, p. 93).

In addition to insuring protection against disturbance at the hands of strangers, possession is either evidence of title or is itself a source of title, so as to enable the possessor to recover the land in case he should have been deprived of possession. "Possession is *prima facie* evidence of title, and, no other interest appearing in proof, evidence of seisin in fee" (*Doe v. Barnard*, 1849, 13 Q. B. 945). Viewed in this light, the evidence is liable to be rebutted, and it was formerly the law that possession did not give a



title to recover in ejectment as against a wrong-doer who could show that the real title was in another (*Doe v. Barber*, 1788, 2 T. R. 749; *Doe v. Barnard*, 1849, 13 Q. B. 945; *Nagle v. Shea*, 1874, 8 Ir. R. C. L. 224). At the present time, however, it seems that mere possession gives a title to recover the land as against a wrong-doer, and it is not open to the latter to show that the plaintiff's title is defective. *Davison v. Gent* (1857, 1 H. & N. 744) is an authority that the plaintiff will not be defeated simply because he does not show a good title, and *Asher v. Whitlock* (1865, L. R. 1 Q. B. 1), that possession is in itself a sufficient title. "I take it as clearly established," said Cockburn, L.C.J., in the latter case, "that possession is good as against all the world, except the person who can show a good title." Practically this means that the old law as to seisin now applies to possession. Seisin, though tortious, gave a good title against all except the true owner, and possession seems now to have the same result.

Where the possessor without title remains in possession for the time required under the Statute of Limitations to extinguish the title of the true owner—usually twelve years (see LIMITATION)—he then acquires a title which is good against all the world (*Doe v. Sumner*, 1845, 14 Mee. & W. 39), and which is free from any covenants or restrictions affecting the old title (see *Tichborne v. Weir*, 1892, 67 L. T. 735). If, however, there are successive possessors, no one of whom remains in possession for the statutory period, it has been doubted in which of them the title is to be deemed to be vested when that period has elapsed. In *Dixon v. Gayfere* (1853, 17 Beav. 421) it was considered by Romilly, M. R., that the one actually in possession at the end of the time would be entitled to retain possession against the rest; but the opinion was founded upon the doctrine, now apparently erroneous, that possession did not give a good title on which to recover in ejectment. It seems more probable, at any rate where the possessors are in the position of successive disseisors, that each would have a right to recover against the subsequent possessors, and the last possessor would not be safe until all the rest had been successively barred by lapse of time (see Pollock and Wright, *Possession*, p. 95).

In the case of goods, legal possession is recognised more readily than in the case of land, and the mere right to possession is sometimes described as "constructive possession," and is allowed the advantages of legal possession. Thus the grantee of wreck can maintain trespass against a wrong-doer for taking goods stranded within his liberty, though he has not seized them; and this upon the principle that "the right to the possession draws after it a constructive possession which is sufficient to support the action" (*Bailiffs of Dunwich v. Sterry*, 1831, 1 Barn. & Adol. 831, see p. 842; *Smith v. Miller*, 1786, 1 T. R. p. 480). So, trover lies at the suit of the grantee of foreshore for seaweed cast upon the shore (*Brew v. Haren*, 1877, 11 Ir. R. C. L. 198). But this principle has not been carried so far as to make such seaweed, before it has been gathered by the owner of the shore, the subject of larceny (*R. v. Clinton*, 1869, 4 Ir. R. C. L. 6).

The right of the finder of a chattel to recover on his mere possession against a wrong-doer was conclusively established by *Armorie v. Delamirie*, (1722, 1 Stra. 505; 1 Sm. L. C., 10th ed., p. 343). The plaintiff, a chimney-sweeper's boy, found a jewel and carried it to the shop of the defendant, who was a goldsmith, to know what it was. The defendant's apprentice, under pretence of weighing it, took out the stones, and the defendant offered the plaintiff three halfpence for it. The plaintiff refused to accept the money, and the socket was handed back to him without the stones. It was ruled by Pratt, L.C.J., that the finder of a jewel, though he does



not by such finding acquire an absolute property or ownership, yet has such a property as will enable him to keep it against all but the rightful owner, and consequently may maintain trover; and in default of the defendant producing the jewel, the jury were directed to assess the damages according to the value of the best jewel which would fit the socket; and this they did.

*In Possession.*—As applied to an estate or interest, these words usually mean that the right is immediate, and not in reversion, remainder, or expectancy. They have this meaning, accordingly, in secs. 2 (5) and 58 (1) of the Settled Land Act, 1882 (per Baggallay, L.J., in *In re Jones*, 1884, 26 Ch. D. p. 741; per Cotton, L.J., in *In re Atkinson*, 1886, 31 Ch. D. p. 580); and a person may have, for the purposes of the Act, an estate in possession, notwithstanding that the actual possession or receipt of income is in a trustee for him, or (if he is an infant) in his guardian (*In re Morgan*, 1883, 24 Ch. D. p. 116); or although there are prior charges which absorb the income (*In re Jones, supra*; *In re Clitheroe Estate*, 1885, 31 Ch. D. 135). Sometimes, however, the phrase is treated as equivalent to “vested,” and the words “entitled to an estate tail in possession” have, to effectuate the intention of particular instruments, been construed as meaning “entitled to a vested estate” in the property, although the actual possession was postponed to an existing life estate (*Martelli v. Holloway*, 1872, L. R. 5 H. L. 532; *Foley v. Burnell*, 1783, 1 Bro. C. C. 274; 4 Bro. P. C. 319).

### **Possession-Money.**—See SHERIFF.

**Possession (of Ships).**—The Admiralty Court (now Division) has always had jurisdiction to grant possession of a ship to its owner as against a wrong-doer, and for that purpose to grant a warrant of arrest against the ship (*The Warrior*, 1818, 2 Dod. 289, Lord Stowell; *In re Blanchard*, 1823, 2 Barn. & Cress. 249; *The Peggy*, 1820, 3 Dow & Ry. 178 n.); but until 1840 it could not determine questions between rival claimants setting up title to a ship. In that year the Admiralty Court Act gave the Court power to decide all questions as to title or ownership of any ship or vessel, or the proceeds thereof remaining in the registry arising in any cause of possession (s. 4), and consequently to inquire into the validity of title to a ship, e.g. whether a sale gave a good title to the purchaser (*The Eliza Cornish*, 1853, 1 Sp. 36; *The Empress*, 1856, Swa. Ad. 160; *The Victor*, 1865, 13 L. T. N. S. 521; *The Margaret Mitchell*, 1858, Swa. Ad. 382). The Court was thus held to have power to order a mistake in a ship's register to be corrected, which prejudiced the title of a plaintiff entitled to a decree of possession (*The Rose*, 1873, L. R. 4 Ad. & Ec. 6). By the practice of the Admiralty Court the person actually in possession of the ship was always favoured, and the plaintiff who sought to disturb him had to prove his claim clearly (*The Victoria*, 1859, Swa. Ad. 408, equitable owner of half the ship held entitled to retain possession as against the legal owner of more than half; *The Glasgow*, 1856, *ibid.* 145); and a party claiming title to a ship could not rely on two conflicting titles (*The Margaret Mitchell*, 1858, above). Before the Judicature Act the suit had to be instituted by legal owners; and the Court did not in practice allow its process to be set in motion for protecting merely equitable interests, though “it was not merely ministerial,” and it could hold its hand where it was equitable to do so (*The Sisters*, 1802, 4 Rob. C. 275, and 5 *ibid.* 155; Williams and Bruce,



*Admiralty Practice*, 451), and a distinction was recognised between "enforcing an equitable right at the instance of the party claiming it and refusing to enforce the claim of a legal owner to the disregard of an equitable right" (Dr. Lushington, *The Victoria*, above). By that Act equitable interests in ships were put on the same footing as legal (ss. 24, 25).

A master seeking to retain possession of a ship against the will of the majority of her owners can be dispossessed by a suit of possession, and the Court generally allows this to be done without "minutely considering the merits or demerits of his conduct," even though he be also a part-owner, if some special reason were shown, and even, it seems, without such (*The New Draper*, 1802, 4 Rob. C. 290; *The Johan and Siegmund*, 1810, Edw. 242), and even although he offers security for the value of the other owner's interests (*The Kent*, 1862, Lush. 495). Power to remove a master is now given by the Merchant Shipping Act to the High Court (s. 472), and naval Courts (s. 483).

In the case of a foreign ship, the Court is disinclined to adjudicate concerning its possession; it only does so in order to prevent inconvenience and loss which would arise from resorting to Courts in foreign countries, and only generally, though not necessarily, if the consul of the country to which the ship belongs consents to the Court exercising this jurisdiction, or if its doing so only carries into effect the decision of a foreign Court (*The Martin of Norfolk*, 1802, 4 Rob. C. 297; *The See Reuter*, 1811, 1 Doct. 23; *The Johan and Siegmund*, above; *The Evangelistria*, 1876, 2 P. D. 241). Notice must in such a case be given to the foreign consul; in the affidavit to lead warrant of arrest the national character of the ship must be stated, and service of such notice and a copy of such notice annexed thereto (Williams and Bruce, 246). Where the main question in the case of a foreign ship depends on foreign municipal law, the Court will not decree possession, and so deprive a party of his possible rights (Lord Stowell, *The Johan and Siegmund*, above). But it will hear a suit instituted by a British subject to recover possession of a ship which has come to this country in the possession of foreigners (*The Experimento*, 1815, 2 Dod. 38).

In a suit between co-owners for the possession of a ship, the majority may arrest her and get a decree of possession to enable them to send her on a particular voyage (*The New Draper*, above,  $\frac{9}{16}$  of her shares held enough for this purpose, though master was part-owner; *The Kent*, above,  $\frac{4}{8}$  enough; *The Elizabeth and Jane*, 1841, 1 Rob. W. 282,  $\frac{1}{2}$  not enough; *The Egyptienne*, 1825, 1 Hag. Adm. 326); and the minority cannot retain possession by offering to give full security of the value of the majority's interest (*The Kent*, above); but the majority may have to give security for the minority's interest (*The Apollo*, 1824, 1 Hag. Adm. 306). The Court, however, will not at the suit of a British part-owner of a foreign ship arrest her till bail is given for her safe return to her port abroad (*The Graff Arthur Bernstoff*, 1854, 2 Sp. 31), unless proof is given that the remedy (by action of restraint) which exists in England exists in that country also. Owners who do not support an application to change possession are presumed not to wish it changed (*The Valiant*, 1839, 1 Rob. W. 67, where a plaintiff died while a possession cause was pending, and his personal representative did not authorise proceeding, the Court deducted his share from the interest of the promoters).

A ship may be sold in a suit between co-owners touching her ownership, possession, employment, or earnings, if she is registered in England or Wales, by order of the Court (1861, Admiralty Court Act, s. 8).

In a possession suit the Court will grant a monition for producing the



ship's papers or register (*The Frances of Leith*, 1820, 2 Dod. 420; *The Peggy*, 1820, 3 Dow. & Ry. 178 n.); and the Division can now in such an action order the delivering up of the ship's register certificate to the majority of part-owners (*The Native Pearl*, 1877, 3 Asp. 515). For the method of enforcing a decree of possession, see Williams and Bruce, 299, 300. In a possession suit, bail may be given for the ship either by consent of parties or by order of the Court, if this can be done without defeating the object of the suit (*The Gauntlet*, 1871, L. R. 3 Ad. & Ec. 319). In an action of possession, persons who have not appeared and who are interested in the ship may be ordered by the Court to become parties to the suit, and payment of costs can be enforced from them (*The Native Pearl*, above).

[*Authorities.*—Williams and Bruce, *Admiralty Practice*; Roscoe, *Admiralty Practice*.]

**Possession, Writ of.**—See EXECUTION, vol. v. at p. 142.

**Possessory Action.**—See TRESPASS.

**Possessory Lien.**—*Definition.*—A possessory lien is a right of a person who has possession of goods or chattels belonging to another person, to retain the possession thereof until the payment or discharge of some debt or obligation by the owner of the goods or chattels. A general lien is a right to retain the goods or chattels in respect of a general balance of account, or until the payment or discharge of a debt or obligation not necessarily incurred in respect of such goods or chattels. A particular lien is confined to debts and obligations incurred in respect of the goods or chattels subject to the lien. A possessory lien is a mere personal right to retain possession, and there is no right of sale incident thereto, even if the retention of the chattel is attended with expense (*Mulliner v. Florence*, 1878, 3 Q. B. D. 484; *Thames Iron Works v. Patent Derrick Co.*, 1860, 29 L. J. Ch. 714). Nor is there any right to make a charge for rent, or for the expense of keeping the chattel (*Somes v. British Empire S. Co.*, 1860, 8 Cl. H. L. 338). Provision has, however, been made by the Merchant Shipping Act, 1894 (ss. 494–498), and by the Innkeepers Act, 1878, for the sale, in certain cases, of goods or chattels subject to the lien of a shipowner for freight, or of an innkeeper.

*How acquired.*—A possessory lien may arise at common law, or by virtue of an agreement, express or implied. An innkeeper has, at common law, a general lien on the goods and chattels brought to the inn by a guest, for what is due for his lodging, board, and entertainment (*Thompson v. Lacy*, 1820, 3 Barn. & Ald. 283; *Mulliner v. Florence*, 1878, 3 Q. B. D. 484), even if such goods or chattels do not belong to the guest, provided they are brought to the inn as part of his luggage (*Robins v. Gray*, [1895] 2 Q. B. 501; *Threfall v. Borwick*, 1872, L. R. 7 Q. B. 711; *Yorke v. Grenaugh*, 1701, 2 Raym. (Ld.) 866). (See also INNKEEPER.) Common carriers also have, at common law, a particular lien for their charges for carrying goods, whether the goods are the property of the person tendering them for carriage or not (*Exeter Carrier's case*, cited 2 Raym. (Ld.) 867). But they have no general lien for charges due in respect of the carriage of other goods (*Wright v. Snell*, 1822, 5 Barn. & Ald. 350; *Rushforth v. Hadfield*, 1805, 6 East, 519; *Oppenheim v. Russell*, 1802, 3 Bos. & Pul 42; *Butler v. Woolcott*, 1805,



2 Bos. & P. N. R. 64). (See also CARRIER.) Every person who repairs, alters, or otherwise bestows labour or skill upon goods or chattels has, at common law, a particular lien thereon for his remuneration—as in the case of a shipwright who repairs a ship (*Franklin v. Hosier*, 1821, 4 Barn. & Ald. 341; *Williams v. Allsup*, 1861, 10 C. B. N. S. 417), a printer who prints a paper (*Blake v. Nicholson*, 1814, 3 M. & S. 167), a trainer who trains race-horses (*Bevan v. Waters*, 1828, 3 Car. & P. 520; *Jacobs v. Latour*, 1828, 2 Moo. & P. 201), a stallion-keeper whose stallion covers a mare (*Scarfe v. Morgan*, 1838, 4 Mee. & W. 270), a miller who grinds corn (*Chase v. Westmore*, 1816, 5 M. & S. 180)—and if work is bestowed on several chattels under one entire agreement, the lien for the whole price extends to all the chattels (*Blake v. Nicholson*, 1814, 3 M. & S. 167; *Marks v. Lahee*, 1837, 4 Sco. 137). But this common law lien arises only where labour or skill is bestowed upon the goods or chattels. Where a mortgage deed was delivered to an auctioneer, in order that he might obtain payment of the amount due, it was held that he had not, at common law, any lien on the deed for his charges for several applications made by him for the money (*Sanderson v. Bell*, 1834, 2 C. & M. 304). So, a livery stable keeper or agister of cattle has no lien, at common law, for his charges for merely feeding horses or cattle (*Judson v. Etheridge*, 1833, 1 C. & M. 743; *Wallace v. Woodgate*, 1824, Ry. & M. 193; *Jackson v. Cummins*, 1839, 5 Mee. & W. 342; *Yorke v. Grenaugh*, 1701, 2 Raym. (Ld.) 866). As to the lien of an unpaid seller of goods, see Sale of Goods Act, 1893, ss. 41–43. And see SALE OF GOODS.

Except in the case of innkeepers, a general lien can only exist by virtue of an agreement, express or implied (*Bock v. Gorrisen*, 1861, 30 L. J. Ch. 39). Factors (see FACTOR), insurance brokers (see BROKER (INSURANCE)), solicitors (see SOLICITOR), bankers (see BANKER AND CUSTOMER), wharfingers (*Naylor v. Mangles*, 1794, 1 Esp. 109; 5 R. R. 722; *Spears v. Hartley*, 1798, 3 Esp. 81; 6 R. R. 814), and packers (*In re Witt*, 1876, 2 Ch. D. 489; *Green v. Farmer*, 1768, 4 Burr. 2214) have a general lien by implication from custom. Where, however, a usage or custom is relied upon as evidence of an implied agreement for a general lien, the usage or custom must be reasonable, and must be shown to have been acted upon in previous dealings between the parties, or be proved to be so notorious that they may reasonably be presumed to have contracted subject to it (*Rushforth v. Hadfield*, 1805, 6 East, 519; *Leuckart v. Cooper*, 1836, 3 Sco. 521; *Bleadon v. Hancock*, 1829, Moo. & M. 465; *Kirkman v. Shawcross*, 1794, 6 T. R. 14). Such a usage has been proved and given effect to in the case of calico-printers (*Webb v. Fox*, 1797, 2 Pea. 167; *Weldon v. Gould*, 1801, 3 Esp. 268) and dyers (*Savill v. Barchard*, 1801, 4 Esp. 52).

Except in the case of the lien of innkeepers or common carriers, who are bound by law to render their services to anyone requiring them, and except where otherwise provided by statute (as by the Factors Act, 1889, and the Sale of Goods Act, 1893, s. 25), a possessory lien is, as a general rule, effective only against the person who is liable to pay the debt or discharge the obligation secured thereby, and is confined to his rights in the goods or chattels at the time when the lien attaches (*Richardson v. Goss*, 1802, 3 Bos. & Pul. 119; *Buxton v. Baughan*, 1834, 6 Car. & P. 674; *Young v. English*, 1843, 7 Beav. 10; *In re Llewellyn*, [1891] 3 Ch. 145; *Copland v. Stein*, 1799, 8 T. R. 199; *Hollis v. Claridge*, 1813, 4 Taun. 807). There is one exception to this rule. If moneys or negotiable securities are deposited with a person, who takes them in good faith, he will acquire the same right of lien, as against all the world, as he would have acquired against the person depositing them if such person had been the absolute owner thereof,



provided that at the time when the lien attaches he has no notice of any defect in the title of such person (*Jones v. Peppercorne*, 1858, John. 430; *Brandao v. Barnett*, 1846, 12 Cl. & Fin. 787; *Misa v. Currie*, 1876, 1 App. Cas. 554; *Solomons v. Bank of England*, 1810, 13 East, 135; 12 R. R. 341; *Locke v. Prescott*, 1863, 32 Beav. 261).

*Agreement inconsistent with Lien.*—A person cannot have a lien which is inconsistent with any express or implied agreement between him and the person against whom the lien is claimed (*Forth v. Simpson*, 1849, 13 Q. B. 680; *Raitt v. Mitchell*, 1815, 4 Camp. N. P. 146; *Walker v. Birch*, 1795, 6 T. R. 258; *In re Bowes*, 1886, 33 Ch. D. 586), or which is inconsistent with the purpose for which the goods or chattels were delivered to him (*Brandao v. Barnett*, 1846, 12 Cl. & Fin. 787; *Frith v. Forbes*, 1862, 32 L. J. Ch. 10; *Wylde v. Radford*, 1864, 33 L. J. Ch. 51). Nor can a person acquire a lien upon goods or chattels of which he obtains possession unlawfully (*Madden v. Kempster*, 1807, 1 Camp. N. P. 12; *Walshe v. Provan*, 1853, 8 Ex. Rep. 843), or in some other capacity than that in which the lien is claimed (*Dixon v. Stansfeld*, 1850, 10 C. B. 398; *In re Taylor*, [1891] 1 Ch. 590).

*How Extinguished or Lost.*—A possessory lien is extinguished by a tender of the amount due, and may be lost by waiver, express or implied. A waiver is implied whenever the conduct of the person entitled to the lien is such as to indicate an intention to abandon it, or is inconsistent with its continuance (*The Rainbow*, 1885, 53 L. T. 91; *In re Nicholson*, 1883, 53 L. J. Ch. 302; *In re Mason*, 1878, 10 Ch. D. 729). Thus, if he voluntarily parts with the possession of the goods or chattels, he thereby abandons his lien (*Sweet v. Pym*, 1800, 1 East, 4; 5 R. R. 497; *Hathesing v. Laing*, 1873, L. R. 17 Eq. 92), unless he is induced by fraud to part with such possession (*Wallace v. Woodgate*, 1824, 1 Car. & P. 575), or the circumstances under which he does so are consistent with the continuance of the lien, and are such as to clearly show that he intends to retain the lien (*Watson v. Lyon*, 1855, 7 De G., M. & G. 288; *North-Western Bank v. Poynter*, [1895] App. Cas. 56). So, if he sells the goods or chattels in order to reimburse himself (*Mulliner v. Florence*, 1878, 3 Q. B. D. 484; *Gurr v. Cuthbert*, 1843, 12 L. J. Ex. 309), or causes them to be taken in execution at his own suit (*Jacobs v. Latour*, 1828, 5 Bing. 130), or upon a demand being made for them by the owner, claims to retain them on some other ground, without mentioning the lien (*Weeks v. Goode*, 1859, 6 C. B. N. S. 367; *Boardman v. Sill*, 1808, 1 Camp. N. P. 410; *Kerford v. Mondel*, 1859, 28 L. J. Ex. 303), the lien is thereby waived. So, a waiver may be implied from his taking other security for the claim secured by the lien, if the nature of the security or circumstances under which it is taken be inconsistent with the continuance of the lien, or be such as to indicate an intention to abandon it, but not otherwise (*Cowell v. Simpson*, 1809, 16 Ves. Jun. 275; 10 R. R. 181; *Angus v. Maclachlan*, 1881, 23 Ch. D. 330; *Tamvaco v. Simpson*, 1866, L. R. 1 C. P. 363). A possessory lien is not affected by the circumstance that possession of the goods or chattels is obtained from the person entitled to the lien unlawfully, or without his consent (*Dicas v. Stockley*, 1836, 7 Car. & P. 587; *In re Carter*, 1886, 55 L. J. Ch. 230); nor by the circumstance that the claim secured by the lien becomes barred by the Statute of Limitations (*Spears v. Hartley*, 1798, 3 Esp. 81; 6 R. R. 814; *Curwen v. Milburn*, 1889, 42 Ch. D. 424), or the owner of the goods or chattels becomes bankrupt (*Robson v. Kemp*, 1802, 4 Esp. 233; 8 R. R. 831).

[*Authorities.*—See Addison on *Contracts*; Chitty on *Contracts*; Smith's *Mercantile Law*.]



**Possessory Title.**—See POSSESSION.

**Possibility.**—There are two kinds of possibilities: a bare possibility (*e.g.* the expectation of the heir-apparent) and a possibility coupled with an interest (*e.g.* a contingent estate), the latter of which alone is an estate in the eyes of the law.

Possibilities were sometimes classed as common possibilities (*potentia propinqua*) and remote possibilities. A remote possibility is what is sometimes called “a possibility upon a possibility,” and we find it laid down in Coke that the contingency on which a remainder must be limited must be a common possibility or *potentia propinqua*, and not a remote possibility (Co. Rep. 51). This doctrine was cited with approval, and adopted by Mr. Fearn in his work on *Contingent Remainders*. For a history of the doctrine and the criticisms made on it, see CONTINGENT REMAINDERS. The doctrine, whatever its precise extent may be, has given rise to the well-known rule that “if land is limited to an unborn person during his life, a remainder cannot be limited so as to confer an estate by purchase on that person’s issue” (Buller’s *Note to Fearn*, 10th ed., vol. i. p. 565 (*n*), quoted in *Whitby v. Mitchell*, *infra*). The rule, as thus stated, strangely enough did not come up for decision in the Courts till the comparatively recent case of *Whitby v. Mitchell*, 42 Ch. D. 494; 1890, 44 Ch. D. 85; and the Court there held that the old rule against “a possibility on a possibility” applicable to limitations of real estate, namely, that although an estate may be limited to an unborn person for his life, yet a remainder cannot be limited to the children of that unborn person as purchasers, is still existing, and has not been abrogated by the more modern law against perpetuities; the two rules being in fact independent and coexisting. And in *In re Frost*, 1889, 43 Ch. D. 246, the doctrine was extended so as to make void for remoteness limitations after the life estate of any husband the testator’s daughter might marry, such limitations being to children of the daughter living at the death of the survivor of herself and her husband. The *ratio decidendi* was that the daughter might, after the testator’s death, marry a person not born in the lifetime of the testator, and there might then be a limitation to the daughter for life, remainder to an unborn person, and a contingent remainder over to people living at the death of an unborn person—a double possibility.

**Possible.**—As to the meaning in the contract of the words “if possible,” see *Wilson v. Rynock*, 1877, W. N. 164. See SOON.

**Post dating.**—See BILLS OF EXCHANGE, xiii.; CHEQUE, 3.

**Postea.**—The *postea* was the indorsement on the record of a trial at Nisi Prius of what had been done at the trial. Its place is now taken by the certificate of the judgment, directed by R. S. C., Order 36, r. 42, to be in the form No. 17, Appendix B (*Annual Practice*, vol. ii.).

**Post Entry**—A subsequent corrective entry made by an importer of goods who has already made an entry of them and delivered it to the



Customs authorities, but finds that in it he understated the goods on his vessel. If, on the other hand, the first entry was excessive, the amount overpaid or bonded is returned, upon the oath of the importer attested by the collector (see as to entries, article CUSTOMS).

**Posthumous Child.**—See EN VENTRE SA MÈRE.

The presumption in favour of the legitimacy of a child born within “a competent time” after a marriage has been determined by the husband’s death is as strong as that in favour of offspring born during wedlock (see LEGITIMACY). Upon its birth it will, as a rule, be placed at once, as to rights and advantages, where it would have stood at its father’s death, if at the time of that event it had been already born. It will not lose its heirship of lands in fee, though meantime the person who, failing the posthumous child, would be heir takes “*quasi* by descent” (*Shelley’s case*, 1579–1581, 1 Co. Rep. 93), and enjoys the mesne profits. And in all other matters of property the posthumous child is treated as a child living at its father’s death (*Trower v. Butts*, 1823, 1 Sim. & St. 181). While it is still *en ventre sa mère*, it may have a guardian under 12 Chas. II. c. 24, s. 8; a writ to stay waste will be granted in its interests (*Lutterel’s case*, “in my Lord Bridgman’s time,” cited in *Hale v. Hale*, 1692, Prec. in Ch. 50); and generally it will be considered *in esse* for its benefit, but not for its prejudice (*Wallis v. Hodson*, 1740, 2 Atk. 114; *Burnet v. Mann*, 1748, 1 Ves. 156; *Lancashire v. Lancashire*, 1792, 5 T. R. 49; 2 R. R. 535; *Doe v. Clarke*, 1795, 2 Black. H. 399; 3 R. R. 430; *Woodford v. Thellusson*, 1798, 4 Ves. Jun. 321; see also the cases cited under EN VENTRE SA MÈRE). In *Lancashire v. Lancashire*, Kenyon, C.J., said that the true principle was to be found in the words of Vinnius, “*Fictione juris nativitas retrahitur*,” and both in *Doe v. Clarke* and *Woodford v. Thellusson*, Buller, J., used language of the same unqualified character. The principle is too strongly stated in these cases; and criticising them, Page-Wood, V.C., says that it is untrue to say that “for *all* purposes” a child *en ventre sa mère* may be considered as already born (*Richards v. Richards*, 1860, John. 754). One main qualification of that principle, as Page-Wood, V.C., pointed out, is to be found in the rule as to mesne profits, which was long ago stated thus:—

If a man seised of lands in fee hath issue a daughter and dieth, his wife being *ensient* with a son, the daughter soweth the ground, the sonne is borne, yet the daughter shall have the corne, because her estate was lawful, and defeated by the act of God, and it is good for the commonwealth that the ground be sowne.

Thus Coke upon *Litt.* 55 *b*, the reference there given being 16 Hen. VI. c. 6 (1437, not in the Y. B., nor in *Harl. MSS.* No. 4557). The doctrine stated is undoubtedly sound, whatever may be thought of the second and third reasons by which Coke supports it. Upon a descent, when the widow is left *ensient*, the freehold, pending the birth of her child, vests in the presumptive, or, to use Page-Wood, V.C.’s, better description (in *Richards v. Richards*, *ut infra cit.*), “the qualified,” heir, whose estate, so vested for the meantime, is liable hereafter to be divested in favour of the posthumous heir. For the common law will not, except in certain special cases, brook any vacancy, any abeyance, of the freehold; and therefore when an estate is to arise upon such a contingency as the birth of a posthumous child, the freehold must, for “no other end than to keep the feud always full” (Page-Wood, V.C., in *Richards v. Richards*), vest in some person for the meantime until the contingency happens; that person, whoever he is, has the right to the



mesne profits. There were services to be discharged: those services he who was in possession must discharge; it was but bare justice that he who had to discharge the services should receive the profits arising from the lands whose duties it fell to him to discharge. This doctrine, said by Page-Wood, V.C., to be "of the strictest common law character," is well stated in Hargrave and Butler's notes to *Co. Litt.* (ed. 1832, 11 *b* note 59, and 55 *b* note 369), and in Watkins on *Descent* (1st ed., p. 185). Babington, C.J., in 1430 (*Year-Book*, Trin. Term, 9 Hen. VI., fol. 25 *a*), laid down this principle, and his authority was cited in its support by De Grey, C.J., in *Goodtitle v. Newman*, 1774 (3 Wils. 516). Lord Hardwicke, L.C., in *Basset v. Basset*, 1744 (3 Atk. 202), took it for granted that a posthumous child was entitled to the rents and profits of a descended estate from the date of birth only. Until recently the contention has from time to time been raised that this rule applied only to mesne profits already received, and that the "qualified heir" could not claim rents accrued due, but not actually paid, before the birth of the posthumous child. But Page-Wood, V.C., in *Richards v. Richards* (1860, John. 754), declined to follow Vice-Chancellor Stuart's decision in *Goodale v. Gawthorne* (1854, 2 Sm. & G. 375), and held that a posthumous heir is entitled to the rents of a descended estate only from the date of his birth, whether the prior rents have been received or not.

The strict common law principle, just described, does not hold good where the mesne profits are otherwise disposed of by express provision of the parties, as in the case of trustees to preserve contingent remainders, who receive, as a rule, directions in what way they are to apply the rents which come into their hands. But where the estate vested by purchase, and there were no trustees to preserve contingent remainders for posthumous children, the hardship might possibly occur—until a statute was made to prevent it—of a posthumous heir being under such circumstances for ever prevented from enjoying his father's estate, "according to the maxim of the common law, that an estate by purchase must vest *eo instanti* that the last estate determines" (Hardwicke, L.C., in *Millar v. Turner*, 1747-48, 1 Ves. 85, and in *Robinson v. Robinson*, 1750-51, 2 Ves. 225). Such a hardship would have happened but for the House of Lords in "*Reeve v. Long*, in King William's time" (1694, 3 Lev. 408); Lord Hardwicke mentions it (see the cases just cited), and says that it was as a result of *Reeve v. Long* that the Statute 10 & 11 Will. III. (1699) c. 16 was passed. This statute preserves contingent remainders for a posthumous child where there are no trustees for that purpose, and gives such a child the estate in the same manner as if he were born in the father's lifetime, "and is therefore construed to carry the profits from the father's death" (*Co. Litt.* 55 *b*, note 369). *Basset v. Basset* (1744, 3 Atk. 202) is a decision of Lord Hardwicke upon this statute (cp. *Green v. Elkins*, 1742, 2 Atk. 473). The case of personalty is different from that of real estate, "for the right to that may be in suspense, and generally during the time it continues so the profits accumulate till the vesting of the capital happens, and that are added to that, and belong to the same person" (*Co. Litt.* 55 *b*, note 369; see *Green v. Elkins*, *ut supra cit.*; *Studholme v. Hodgson*, 1734, P. Wms. 300; Fearne, *Contingent Remainders*).

The word *divest*, so often occurring in this connection, is invariably used in the form here given by reporters until far into this century, and by Hargrave in his notes to *Co. Litt.*; the most recent usage would appear to favour the form *divest* (see *Foxwell v. Van Grutten*, [1897] App. Cas. at p. 694).



With regard to the making provision, whether by deed or will, for posthumous children, no difficulty can arise so long as the offspring intended to be benefited are to be legitimate; their case is amply covered, even without specific mention, by the principle of *Hale v. Hale*, 1692 (Prec. in Ch. 50); of *Burnet v. Mann*, 1748 (1 Ves. 156); of *Blasson v. Blasson*, 1864 (2 De G., J. & S. 665); they are "children"; they are deemed to be "living at the death" of their fathers, and so on. The difficulty arises when provision is sought to be made for illegitimates not yet born. There are several obstacles: illegitimate offspring are, as a rule, not "children"; and though this obstacle may be easily surmounted in the case of children already born, if they be described strictly with respect to their mother, or have acquired the name and the reputation of "children," there is the further difficulty of avoiding the violation of the rule which forbids anything tending to the encouragement of vice. The contemplation of future illicit intercourse is utterly fatal to the validity of such provision, if made by deed; but as a will speaks from the testator's death, there is a slight possibility of making provision in that way for a bastard unborn, but the possibility is very limited. An early case is *Blodwell v. Edwards*, 1597 (Cro. (2) 509). In *Metham v. Duke of Devon*, 1718 (1 P. Wms. 529), it was said, "Nay, the child *en ventre sa mère* shall not take," in the case of a remainder, where there was no uncertainty of description (see *Co. Litt.* 3 *b*; Hargrave's notes, 1). *Earle v. Wilson*, 1811 (17 Ves. 528; 11 R. R. 130), laid down the rule that a bastard cannot take as the issue of a particular person until it has acquired the reputation of being the child of that person, which cannot be before its birth; in that case the testator sought to provide for such children of a particular woman "as she may happen to be *ensient* of by me" at the time of his death. The most recent cases are: *Crook v. Hill*, 1873, L. R. 6 H. L. 265; *Occleston v. Fullalove*, 1873, 9 Ch. 147, where Lord Selborne (who dissented) was in favour of applying to the case of provision by will the same rigid rule which is enforced in the case of gifts by deed; *In re Hastie's Trusts*, 1887, 35 Ch. D. 728, see esp. p. 733; *Thompson v. Thomas*, 1891, L. R. Ir. 27; Ch. D. 457. Hargrave has a valuable note at *Co. Litt.* 3 *b* (1), and seems to think that in his day (*circ.* 1780) the extent to which the doctrine of the policy of the law in favour of marriage to the prejudice of bastards goes was unsettled. Uncertainty of description, as he points out, is avoided by describing the child strictly in reference to the mother only. There seems, then, a possibility of providing by will for a posthumous child if it be described by reference to its mother only; and even by deed, if the child at the time be already *en ventre sa mère*. But the important dissent of Lord Selborne in *Occleston v. Fullalove* leaves the subject in some doubt, as Stirling, J., recognised in *In re Hastie's Trusts* (*supra cit.*).

The rule which governs the descent of lands in fee extends to copyholds also: the presumptive or qualified heir will be admitted till the contingency — the birth of the posthumous child — happen (Watkins, *Descents*, p. 172; Watkins, *Copyholds*, vol. i. c. v.).

As to borough-English, Watkins says: "If a person die seised of borough-English lands, leaving a son born and another *en ventre sa mère*, the posthumous son shall enter upon his brother, as appears the better opinion" (Watkins, *Copyholds*, vol. ii. c. ii. p. 54; Watkins, *Descents*, c. iv.; Robinson, *Gavelkind*, 5th ed., pp. 246, 247).

The effect of the birth of a posthumous child, whether of the *bastard eigne* or of the *mulier puisne* (in the case where the former has entered and died seised), is stated by Watkins, *Descents*, c. iv. The rule follows



strictly the old law of descents. Watkins questions now whether "the liberality of the times" would not consider such issue as much born for the purpose of making a descent in this instance as in any other (Watkins, *Descents*, p. 184, with his references).

With regard to the succession to a peerage (see *sub voce* BARONY), the general rule which regulates the descent of real estate is followed. The posthumous child would on birth succeed to the title. The "qualified" (or presumptive) heir will be entitled to the honour in the meantime. But the practice is for the heir-presumptive not to apply for the writ of summons (nor to assume the title) in cases where there is the probability of a posthumous child. Cruise (*Origin and Nature of Dignities*, pp. 201, 202) states that anciently there was a theory that if on the death of a peer, his barony in fee is suspended, and falls in abeyance between his daughters as co-heiresses, his posthumous son is not entitled of right to the peerage; "the son will be a baron, but at the king's pleasure, because the title was once suspended"; though this view could plead some authority, the contrary seems to be now settled law (*In re The Barony of Willoughby de Broke*, 1694, in *Precedents collected by King, Lancaster Herald, Chief Baron Ward's Collection*; see also Collins's *Proceedings, Precedents, and Arguments on Claims and Controversies concerning Baronies by Writ and other Honours*, 1734, pp. 224, 225, 322-331; *Reports from the Lords' Committees touching the Dignity of a Peer of the Realm*, 1822, vol. ii. p. 179).

Two very curious questions in respect of posthumous children are raised by Coke.

He instances at 29 *b*, notes (*Co. Litt.*), the case of a child posthumous in respect of its mother. His words are:—

If a woman seised of lands in fee taketh husband, and by him is bigge with childe, and in her travell dyeth, and the childe is ripped out of her body alive, yet shall he not be tenant by the curtesie, because the childe was not borne during the marriage, nor in the life of the wife, but in the meantime her land descended, and in pleading he must allege that he had issue during the marriage.

His reference is to *Paine's* case, 1587, in his own reports (8 *Co. Rep.* vol. iv. fol. 34), where one *Reppes'* case (*temp.* Phil. & Mary) is cited on Lord Dyer's authority.

The subject has attracted the attention of the writers on medical jurisprudence (Taylor, vol. ii. p. 220; Tidy, vol. ii. pp. 245, 246). But the rule of *curtesy of England*, whether as stated by the ancient writers Bracton (lib. v. c. xxx. fols. 437, 438) and Littleton (1 *Inst.* c. iv. s. 35; *Co. Litt.* 29 *a*), or in modern text-books (Williams, *Real Property*, 16th ed., pp. 266-268), says nothing about the wife being alive; to give the benefit of tenancy by the curtesy, the issue must have been born alive, and, secondly, must have been capable of inheriting as heir of the wife. If a posthumous child is to be deemed *in esse* for the purpose of inheriting from its father, it is hard to see why it should not equally be *in esse* for the purpose of succeeding its mother; the difficulty as to the land descending is not greater in the latter case than in the former (cp. Domat, bk. ii. tit. 1, s. 1, par. 6).

The second remarkable statement of Coke (*Co. Litt.* 8 *a*, note *g*) is this:—

If a man hath a wife, and dyeth, and within a very short time after the wife marrieth againe, and within 9 months hath a childe, so as it may be the childe of the one or the other, some have said, that in this case the childe may choose his father, *quia in hoc casu filiatio non potest probari*, and so is the booke to be intended; for avoiding of which question and other inconveniences, this was the law before the Conquest: *Sit omnis vidua sine marito duodecim mensibus, et si maritaverit perdat dotem*.



Blackstone (vol. i. p. 457) lays down the same principle, and adds the curious detail that a person born under such circumstances "is said to be more than ordinarily legitimate; for he may, when he arrives to years of discretion, choose which of the fathers he pleases." Brooke (*Abr. "Bastardy,"* pl. 18) throws doubt upon this doctrine (*Co. Litt.* 8 *a*, note 7); and the fact that there are instances of the question of such a person's legitimacy being tried by the Courts renders it unlikely that the principle stated by Coke is law (see *Alsop v. Bowtrell*, 1620, Cro. (3) 541; *Thecar's case*, 1624, Cro. (3) 686; and other cases cited in Hargrave's note 190 to *Co. Litt.* 123 *b*). Such a question would now be tried as an issue of fact, subject to the rules of evidence which obtain in cases of legitimacy (see LEGITIMACY). Coke's attempt (*Co. Litt.* 123 *b*, note *f*) to make it a hard-and-fast rule, a *presumptio juris et de jure*, in such cases, that forty weeks is the extreme *legitimum tempus pariendi*, is criticised by Hargrave (note 190\*), and shown to be based upon a misreading of *Radwell's case* (1290), therein cited. The fact of the indecent haste of the second marriage would be a material circumstance to consider in determining the paternity of a child born under such circumstances. Stephen, J., however, in his *Law of Evidence* (art. 98, note), suggests the case of a soldier dying in service in India, and leaving his wife a widow in the camp; the regimental rules compel the widow to leave the station in a limited time, unless she marry again; consequently, a short widowhood is often followed by a second marriage to a soldier within the prescribed period.

It is possible to imagine an actual case in which a person answering to the description given by Coke might practically have the power to exercise the choice attributed to him as his right by Coke and Blackstone; the evidence in favour of the paternity of the one husband might be nicely balanced against that in favour of the other; it might happen that if he could prove himself the issue of the one, he would be entitled to an estate; by claiming the estate, he would affirm that one his father, and if the evidence were no weaker in support of that contention than that in support of the alternative theory, it is difficult to believe that his claim would not prevail. To prevent such questions arising, the civil law (*Cod.* 5. 9. 2) forbade widows to remarry *infra annum luctus* (see also, on this subject, Domat, bk. ii. tit. 1, s. 1, par. 5).

The danger of supposititious posthumous children being palmed off by widows as the lawful offspring of their husband's was early recognised by the English law, which "for the benefit and safety of right heirs *contra partus suppositos*," says Lord Coke (*Co. Litt.* 8 *b*), "hath provided remedie by the writ *de ventre inspiciendo*" (see DE VENTRE INSPICIENDO). The form of the writ is in the *Register* (227 *a*); an early example is the case of *Johanna de Aldham* (1219-1220, *Rot. Lit. Cl.* 4 Hen. III.; Duffus Hardy, *Cl. Roll.* vol. i. p. 435 *b*). Other early cases are in Henry of Bracton's *Note-Book* (Nos. 128, 137, 198, 1503, 1605). The nature of the proceedings is well known. The *verus hæres* (or other person claiming an interest liable to be defeated by the birth of a posthumous child) sued for the writ from the Chancery; the procedure is by way of petition (per Kenyon, M. R., in *Ex parte Bellett*, 1786, 1 Cox C. C. 297; 2 Dick. 781). The writ was directed to the sheriff, who had to make his inquiry by *legales et discretos milites, et legales et discretas mulieres*, twelve of each. He made his return into the Common Pleas; if the woman was found with child, a second writ issued from the Common Pleas to the sheriff for her safe custody; this writ King, L.C., called "*the material writ*" (*Ex parte Aiscough, Lady Chaplin's case*, 1730, Mos. 391; 2 P. Wms. p. 591). The



other cases are collected in MATRONS, JURY OF. The general effect is to show that the remedy is in the nature of a writ of right (per King, Ld., *Ex parte Aiscough*); that no *prima facie* case of fraud is necessary to obtain it (*Mrs. Ann Fox's* case, 1835); that it will be granted to protect any kind of interest (e.g. Jekyll, M. R., in *A.-G. v. La Roche*, 1725, cited in *Ex parte Aiscough*, Mos. 392, granted it for the protection of a charity); and at the suit of any person who has a real, not merely a prospective, interest. It will be granted even though the woman have a husband living (*Thecar's* case, 1623, 3 Cro. (2) p. 686; Win. 71: *Ex parte Wallop*, *In re Brown*, 1792, 4 Bro. C. C. 90; 2 Dick. 767); though in the former case the Court laid it down that the woman ought not to be separated from her husband, and modified the procedure accordingly. The most recent case is *Ex parte Marston*, *In re Mrs. Ann Fox*, 1835 (*The Times*, 1st July, 6th July, 6th August, 1835; *London Medical Gazette*, 1835, vol. xvi. p. 697, "Some Late Proceedings in Chancery: *De Ventre Inspiciendo*," and vol. xvii. p. 191, "Issue of the *De Ventre Inspiciendo* Case"). This case amply illustrates the principles upon which the writ is granted, and also the means which the Courts have consistently employed in order to temper the rigour of the process with humanity and with regard to decency and good feeling. Hargrave (*Co. Litt.* 8 b, note 44, and 123 b, note 190) discusses the subject, and (*Salisbury v. Rawson*, 1895; see *The Times*, 24th May and 8th August 1895) shows that the fraud aimed at by the process is no imaginary danger, and without some safeguard it may be attempted and carried on for a time with some success; in that case, no petition for the writ *de ventre inspiciendo* was presented.

[*Authorities*.—Fleta; Bracton, v. fols. 437, 438; Bracton's *Note-Book*; Britton; Coke, *Litt.*; Blackstone, *Com.* vol. i. p. 456, and vol. ii. p. 169; Cruise, *Digest*, vol. iii. p. 320; Swinburne, *Wills*, pt. iv. s. 15; Watkins, *Descent*, c. iv. "On the Entry of a Posthumous Heir"; Jarman, *Wills*; Powell, *Devises*; Fearne, *Contingent Remainders*; Weightman, *Legitimacy*; Taylor, 1894, *Medical Jurisprudence*, vol. ii. pp. 159, 160, and 238; Tidy, *Legal Medicine*, vol. ii. pp. 108, 109, and 245, 246; Le Marchant's edition (1828) of the *Gardner Peerage Case*, preface, p. xl.]

**Postliminium**—A term of the Roman law derived from *post* and *limes* (a boundary). When a Roman citizen was taken prisoner of war he suffered *maxima capitis deminutio*, and lost his status as a free man, and but for the operation of the *jus postliminium*, his descendants would have ceased to be in his *potestas*. If he returned from captivity, by the fiction of *postliminium* he was deemed never to have been in captivity, and therefore was entitled to enjoy all rights which accrued to him during his captivity. By the *lex cornelia* (B.C. 81) the fiction of *postliminium* was extended to the extent that, if a captive died during his captivity, his death dated from the time of his capture, so that he died free although he lived a captive. *Postliminium*, as applied to persons, has ceased to have any practical effect; but in this connection the following provisions of the Army Act (44 & 45 Vict. c. 58) may be noticed (s. 138):—

"The following penal deductions may be made from the ordinary pay due to a soldier (*i.e.* all below the rank of commissioned officer, s. 190 (6)) of the regular forces:

"(1) All ordinary pay for every day of absence . . . as a prisoner of war."

Sec. 137 enumerates the penal deductions in the case of commissioned officers, but does not mention time as a prisoner of war.



By the Queen's Regulations for the Navy (1670), all officers, seamen, marines, and boys are entitled to their pay while prisoners of war.

*Postliminium*, as applied to property taken in war, remains in operation to the present time, and the following reason is given by writers on international law for its retention:—"That fellow-countrymen may not thrive on the misfortunes of each other."

Originally it was held that a recapture must be effected within twenty-four hours for the doctrine of *postliminium* to apply. But the modern doctrine is that the period of application as regards land capture is twenty-four hours, but as regards maritime captures, until condemnation by a prize Court properly constituted and sitting in the dominions of the Government of the captor or its ally.

In England, *postliminium* is regulated by the Statute 27 & 28 Vict. c. 25 (The Naval Prize Act, 1864), ss. 40, 41, by which British ships or goods recaptured from the enemy by any of Her Majesty's ships are to be restored to the owner by a decree of the prize Court, on his paying as prize salvage one-eighth part of the estimated value, or in special cases not more than one-fourth part of the value.

Provided that where a ship so taken is set forth or used by any of Her Majesty's enemies as a ship of war, the provision for restitution shall not apply.

If a neutral ship be captured by a belligerent either for attempting to run a blockade or for conveying contraband of war to a port of the other belligerent, and should thereafter be recaptured by the other belligerent, the doctrine of *postliminium* would apparently not strictly apply; but the practice of the English Admiralty Courts during the great naval war with France, was to release the recaptured vessel on the payment of prize salvage. If, however, the neutral vessel recaptured was not liable to condemnation, she is entitled to be released by the recaptor without detention or claim for salvage (Lushington, *Manual of Naval Prize Law*, par. 293; Lord Stowell in his judgment in the *War Onskau*, 2 Rob. C. 300).

**Post litem motam.**—See LIS MOTA.

**Postmaster-General.**—See POST OFFICE; TELEGRAPH; TELEPHONE.

**Post-Mortem.**—See CORONER, vol. iii. at p. 425; MEDICAL JURISPRUDENCE, vol. viii. at p. 305; TOXICOLOGY.

**Post-Natus.**—See ANTE-NATUS; BASTARD; LEGITIMACY.

**Post-note**, a bank-note, intended to be transmitted to a distant place by the public mail, and made payable to order; differing in this from a common bank-note, which is payable to the bearer.

**Post-nuptial Settlement.**—See HUSBAND AND WIFE; SETTLEMENTS.



**Post-obit.**—A post-obit bond is a bond, usually a money bond, conditional for payment on, or at a fixed date after the death of a person named, and generally a person from whom the obligor has expectations. Many of the obligations set aside as CATCHING BARGAINS (vol. ii. p. 398), especially in the older cases, have been of this character, and the Court looks at such bonds, when made by an “expectant heir” in favour of a money-lender, with grave suspicion (*Lushington v. Walker*, 1788, 1 Black. H. 95; *Cooke v. Lamotte*, 1851, 15 Beav. 234; *Tottenham v. Green*, 1863, 32 L. J. Ch. 201). In *Hawker v. Hallewell* (1855, 25 L. J. Ch. 558), however, the Court refused to set aside such a bond upon an allegation supported by the debtor’s evidence only, that the debt was a gambling transaction.

A creditor under a voluntary post-obit bond is entitled, as any other creditor, to the benefit of the Statute 13 Eliz. c. 5, against a fraudulent settlement by the obligor (*Adames v. Hallett*, 1868, L. R. 6 Eq. 468).

## Post Office (The).

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### I. HISTORY.

The history of the Post Office in the United Kingdom presents some interesting facts relative to the evolution of the State monopoly, which may properly receive preliminary notice in this article.

In the earliest times in England letters were conveyed by special messengers. Henry I. and his nobility instituted regular messengers (*nuncii*), who travelled on horses supplied by their employers.

In the time of Edward II. fixed stations, or *posts*, were established, at which horses were kept for hire, and the term “post” was consequently applied to the *nuncii* “riding post,” who changed their horses at such places; a common inscription on letters of the period being “Haste, post, haste, for thy life!” When common carriers began (*temp.* Henry VI.) to ply regularly with pack-horses, they were also employed to convey letters.

In 1481 Edward IV., being then at war with Scotland, established a system of posts along the north road, consisting of a series of stations twenty miles apart. Henry VIII. instituted the office of “Master of the Posts,” whose expenditure was called “post money.” By an Act of Edward VI. a uniform charge for the hire of post horses was fixed.

In Elizabeth’s reign the system of posts was greatly extended throughout the kingdom; and foreign correspondence, which had hitherto been left to the management of alien merchants resident in London, was placed under the jurisdiction of the Master of the Posts, whose title was thereupon changed to “Chief Postmaster.” Under James I. the right of the Crown to have the use of post horses in priority to subjects was asserted and exercised.

In 1635 (Car. I.) an extensive scheme of inland posts on the main roads throughout England, and extending to Edinburgh, was proposed by the then “Postmaster-General for Foreign Parts” (Thomas Witherings), and established by proclamation, which contained the prohibition that “no other messengers . . . shall take up, carry, receive, or deliver any letter . . . other than the messengers appointed by the said Thomas Witherings,” with certain exceptions therein stated. The principle of State monopoly



in the conveyance of letters thus inaugurated has since been invariably maintained, and gradually extended to all kinds and methods of correspondence. The parliamentary party vigorously opposed this exercise of royal prerogative, but when they assumed the responsibilities of government they speedily realised the practical advantages it afforded, and resolved that the monopoly should be exercised by Parliament. Consequently when, in 1649, the Common Council of London established a rival system of posts, the scheme was frustrated by statute (1656). Thenceforth the Post Office became the subject of systematic legislation, under which the management of the Post Office, as it now exists, has been gradually developed.

At the Restoration the monopoly thus adopted by the Commonwealth was confirmed by Statute 12 Car. II. c. 35 (sometimes called the Post Office Charter), which re-enacted not only the exclusive privilege as to letters, but also declared the monopoly of providing horses for persons "riding in post," with penalties for infringement. In 1682 another attempt to break the monopoly was made by establishing a local "penny post" in London, it being contended that such service was within the statutory exceptions, but the Court of King's Bench declared the scheme illegal (*Docwra's case*, Skin. p. 84). But this induced the establishment of a special postal service for London at a uniform rate of postage ("the Twopenny post"). Queen Anne's reign witnessed another attempt to establish a rival post in London ("the Halfpenny post"), with a similar result (*Porcy's case*, 8 Anne). In 1710 a general Post Office Act (9 Anne, c. 10) was passed, which consolidated the previous statutes, and brought the postal service of the colonies within the control of the Postmaster-General. In 1778 the Postmaster-General's monopoly of providing post horses was abolished by Act 19 Geo. III. c. 51, which substituted post-horse licences and other duties under the Inland Revenue. In 1784 mails were for the first time conveyed in England by mail coaches, then recently invented. In the same year the Irish Parliament created an independent Postmaster-General for Ireland, but on the accession of Her Majesty in 1837 a series of statutes re-established one Postmaster-General for the whole of Her Majesty's dominions, and defined his privileges, powers, and duties (1 Vict. cc. 32, 33, 34, 35, 36).

The various successive developments of the Post Office system during Her Majesty's reign are remarkable.

In 1838 legislative provision was made for the conveyance of mails on railways, and that method of conveyance, which greatly facilitated the introduction of the penny postage system, has been from time to time extended by subsequent statutes, and now includes tramways. In 1839 an Act was passed temporarily providing a uniform rate of postage for letters, and abolishing the much abused privilege of "franking." The year 1840 brought the complete accomplishment of the "penny postage" scheme throughout the United Kingdom, which was authorised by Statute 3 & 4 Vict. c. 96, and effected a revolution in Post Office work. Numerous subsequent Acts have greatly extended the services rendered by the department in respect of newspapers, book-packets, pattern and sample packets, postcards, and other subjects of postal traffic. The development of the general system may be said to have culminated in the addition of the *Parcel Post* in 1882, under the Act 44 & 45 Vict. c. 74, which contains detailed arrangements between the department and the railway companies throughout the United Kingdom for carrying out this important scheme. The duties of railway companies under that Act in respect of receiving, delivering, and transferring parcel mails at their stations have been



judicially considered and defined (*R. v. L. & N.-W. Rwy. Co.*, 1896, 65 L. J. Q. B. 516). All differences as to remuneration for the conveyance of mails by railway or tramway are now determined by the Railway Commission (56 & 57 Vict. c. 38).

By the Act of 1840 (s. 38) the public also became entitled "to remit small sums of money through the post by means of *money orders*." This privilege was developed by the Money Order Act, 1848 (11 & 12 Vict. c. 88), and was subsequently extended by the creation of "Postal Orders" in 1880 and 1883 (43 & 44 Vict. c. 33, and 46 & 47 Vict. c. 58).

The Post Office *Savings Bank* "for depositing small savings at interest with the security of the Government" was instituted in 1861, by Act 24 Vict. c. 14; and further Acts for this purpose were passed in 1869, 1874, 1880, 1882, and 1893, by virtue whereof depositors are enabled within certain prescribed limits as to amount, etc., to invest in Government funds, and to effect insurances and purchase annuities.

In 1868 the long-existing public agitation for bringing under the control of the Post Office the working of *telegraphs* throughout the United Kingdom, resulted in the passing of the Telegraph Act, 1868 (31 & 32 Vict. c. 110), "to enable H.M. Postmaster-General to acquire, work, and maintain electric telegraphs in connection with the administration of the Post Office," giving him voluntary powers for purchasing existing undertakings, and imposing a uniform rate of charge for transmission throughout the United Kingdom, which rate was subsequently reduced by Act in 1885. That measure was followed by the Telegraph Act, 1869, conferring a monopoly on the Postmaster-General in respect of the transmission of telegrams, coextensive with his monopoly of the conveyance of letters, and conferring compulsory powers for acquiring all existing undertakings. In 1870 the transfer, so authorised, of telegraphic business hitherto carried on by the several companies established under the general Telegraph Act, 1863, was effected, and the system was extended to include the Channel Islands and Isle of Man (Telegraph Act, 22 Vict. c. 88). By the Telegraph Act, 1878 (41 & 42 Vict. c. 76), further powers to establish telegraphic lines were conferred on the Postmaster-General, with various protective provisions hereafter referred to. And, finally, by the Telegraph Act, 1892 (55 & 56 Vict. c. 59), the Post Office is empowered to develop "that part of the telegraphic system of the United Kingdom called the telephonic system," by purchasing and working trunk lines in connection with the exchange systems of certain licensee companies located in the chief business centres of the kingdom. See TELEGRAPH; TELEPHONE.

Before proceeding to consider, in the next place, the extent and consequences of the Post Office monopoly, it will be useful to observe that the statutory definition of the term "*post letter*" has been from time to time amended and extended by successive enactments, as required by the development of the departmental service, and is now synonymous with "postal packet," which means (P. O. Act, 1875, s. 10) "a letter, postcard, newspaper, book-packet, pattern or sample packet, circular, legal and commercial document, packet of photographs, and every packet or article which is not for the time being prohibited by or in pursuance of the Post Office Acts from being sent by post"; and inclusive of "such postal packets as are defined by regulations of the Treasury to be parcels," and also including telegrams (P. O. Act, 1884, s. 20). Such packet is to be deemed a post letter from the time of its being delivered to a post office to the time of its being delivered to the person to whom it is addressed, or at his house or office, according to the usual manner of such delivery (*ibid.* s. 19).



## II. THE MONOPOLY AND INCIDENTAL MATTERS.

The exclusive privilege of the Post Office in respect of letters is defined by Statute 1 Vict. c. 33 (the Post Office Management Act, 1837), sec. 2 whereof enacts—

That Her Majesty's present Postmaster-General and the person or persons to be from time to time hereafter appointed by the Queen's Majesty by Letters Patent under the Great Seal of Great Britain shall be the Master of the Post Office by the style of Her Majesty's Postmaster-General and wheresoever within the United Kingdom and other Her Majesty's dominions posts or post communications are now or may be hereafter established the Postmaster-General by himself or by his deputies and their respective servants and agents shall have the exclusive privilege of conveying from one place to another all letters except in the following cases and shall also have the exclusive privilege of performing all the incidental services of receiving collecting sending despatching and delivering all letters except in the following cases (that is to say):—

Letters sent by a private friend in his way journey or travel so as such letters be delivered by such friend to the party to whom they shall be directed.

Letters sent by a messenger on purpose concerning the private affairs of the sender or receiver thereof.

Commissions or returns thereof and affidavits and writs process or proceedings or returns thereof issuing out of the Courts of justice.

Letters sent out of the United Kingdom by a private vessel (not being a packet boat).

Letters of merchants owners of vessels of merchandise or the cargo or loading therein sent by such vessels of merchandise or by any person employed by such owners for the carriage of such letters according to their respective directions and delivered to the respective persons to whom they shall be directed without paying or receiving hire or reward advantage or profit for the same in anywise.

Letters concerning goods or merchandise sent by common known carriers to be delivered with the goods which such letters concern without hire or reward or other profit or advantage for receiving or delivering such letters.

But nothing herein contained shall authorise any person to make a collection of such excepted letters for the purpose of sending them in the manner hereby authorised.

And the following persons are expressly forbidden to carry a letter or to receive or collect or deliver a letter although they shall not receive hire or reward for the same (that is to say):—

Common known carriers their servants or agents except a letter concerning goods in their carts or waggons or on their pack-horses and owners drivers or guards of stage coaches.

Owners masters or commanders of ships vessels steamboats or boats called or being passage or packet boats sailing or passing coastwise or otherwise between ports or places within Great Britain or Ireland or between to or from a port or ports within Her Majesty's dominions or territories out of the United Kingdom or their servants or agents except in respect of letters of merchants owners of ships or goods on board.

Passengers or other persons on board any such ships vessels steamboat passage or packet boat.

The owners of or sailors watermen or others on board a ship vessel steamboat or other boat or barge passing or repassing on a river or navigable canal within the United Kingdom or other Her Majesty's dominions.

The exclusive privileges as to letters so conferred upon the Postmaster-General for the benefit of the public revenue, are protected by correlative penal provisions contained in a contemporary Statute 1 Vict. c. 36 (the Post Office Offences Act, 1837), sec. 2 of which prescribes penalties against every person committing any of the following acts (with cumulative penalties for continued practices), viz.—(1) conveying otherwise than by the post a letter not exempted from the exclusive privilege of the Postmaster-General; or (2) performing otherwise than by the post any services incidental to conveying such letters from place to place; or (3) sending any such letter, or causing it to be sent or conveyed otherwise than by post; or (4) making a collection of exempted letters for the purpose of conveying or sending them otherwise than by the post, or by the post.



Some cases which have arisen and formed the subject of judicial decision under the above-mentioned enactments may conveniently be here noticed. In the year 1869 a company incorporated and registered under the Companies Act, 1862, for the delivery of circulars, the carriage of parcels, and other similar objects, was convicted under the Post Office Acts for conveying, otherwise than by post, a certain letter not exempted from the exclusive privilege of the Postmaster-General, and being in fact one of a large number of circulars which the company undertook to deliver to their respective addressees, at a certain rate of remuneration. And upon appeal to the Court of Queen's Bench on a case stated by the magistrate, the conviction was affirmed (*The Circular Delivery Co. Ltd. v. Clare*, 1869, 20 L. T. N. S. 701).

In 1886 an important question respecting the carriage of mails by sea arose between the Post Office and the Cunard Steamship Company Ltd. The company, who were not at the time (as they previously had been) under contract for conveying mails, ventured to convey, by a particular vessel, from Liverpool to New York, letters collected by their agents in England, and addressed to consignees of goods shipped by that vessel. At the same time the company refused to convey by that vessel a ship letter mail which the Postmaster-General caused to be tendered to them for conveyance thereby, under the Post Office Act 3 & 4 Vict. c. 96, s. 36. An English information by the Attorney-General was filed against the company, praying for a declaration of the rights of the Postmaster-General, and for an injunction, and ultimately (in May 1889) a decree was made accordingly.

The Telegraph Act, 1869 (32 & 33 Vict. c. 73), extended the exclusive privileges of the Postmaster-General in respect of letters to all telegrams transmitted within the United Kingdom. Sec. 3 of that Act declares that—

The term "telegram" shall mean any message or other communication transmitted or intended for transmission by telegraph :

The term "telegraph" shall in addition to the meaning assigned to it in the Telegraph Act 1863 mean and include any apparatus for transmitting messages or other communications by means of electric signals.

By sec. 4 it is enacted that—

The Postmaster-General by himself or by his deputies and his and their respective servants and agents shall from and after the passing of this Act have the exclusive privilege of transmitting telegrams within the United Kingdom of Great Britain and Ireland except as hereinafter provided and shall also within that Kingdom have the exclusive privilege of performing all the incidental services of receiving collecting or delivering telegrams except as hereinafter provided.

Sec. 5. There shall be exempted from the said exclusive privileges of the Postmaster-General all telegrams of the following descriptions (that is to say)—

Telegrams in respect of the transmission of which no charge is made transmitted by a telegraph maintained or used solely for private use and relating to the business or private affairs of the owner thereof.

Telegrams transmitted by a telegraph maintained for the private use of a corporation company or person and in respect of which or of the collection receipt and transmission or delivery of which no money or valuable consideration shall be or be promised to be made or given.

Telegrams transmitted with the written licence or consent either special or general of the Postmaster-General under the hand of any officer of the Post Office authorised for that purpose by the Postmaster-General.

Telegrams transmitted by a telegraph company existing on the 22nd day of July 1869 the undertaking of which shall not for the time being have been acquired by the Postmaster-General.



Telegrams the transmission of which is authorised by the provisions of the Telegraph Act 1868 or any agreement confirmed thereby or made or to be made in pursuance thereof.

Telegrams transmitted to or from any place out of the United Kingdom of Great Britain and Ireland.

Sec. 6 prescribes penalties for transmitting, or aiding or being concerned in transmitting, any telegram in contravention of the exclusive privilege conferred on the Postmaster-General by that Act, or receiving, collecting, or delivering any telegram in contravention of such exclusive privilege, or aiding, or being concerned in the receipt, collection, or delivery of such telegram, in contravention of such privilege.

Sec. 23 makes every telegram a "post letter" within the meaning of the Act 1 Vict. c. 36.

The invention of the telephone, and the formation of a public company (the Edison Telephone Company of London Ltd.) to work that invention in the United Kingdom, raised in 1880 the important question whether their operations constituted an infringement of the Postmaster-General's exclusive privileges under the Telegraph Act, 1869. Upon the hearing of an English information filed by the Attorney-General against the company, praying for a declaration as to the rights of the Postmaster-General, and for an injunction, the Court gave judgment in favour of the informant on behalf of the Crown, and a decree for the relief prayed for was accordingly made (*A.-G. v. The Edison Telephone Co. Ltd.*, 1881, 6 Q. B. D. 244). In consequence of that decision the subsequent operations of that and other telephone companies have been conducted by virtue of formal licences granted by the Postmaster-General, in consideration of certain royalties and other prescribed conditions.

Other developments of telegraphy have given rise to similar questions in regard to the Postmaster-General's monopoly, and which, either in consequence of litigation or by arrangement, have been determined in favour of the public revenue. In 1891 two public companies which were incorporated for the purpose of working a system of telegraphs described as the "call system," were proceeded against upon information by the Attorney-General, and ultimately by arrangement in each case a decree was entered, restraining the defendant company from receiving and collecting messages by their telegraphs, and performing incidental services in connection therewith (*A.-G. v. Boys Messenger Co. Ltd.* and *A.-G. v. District Messengers, etc., Co. Ltd.*, *Times*, April 15, 1891). The subsequent operations of those companies were consequently carried on under licence by the Postmaster-General.

Among the incidental privileges of the Post Office expressly conferred by statute is the exemption from tolls on highways, etc. By sec. 19 of 1 Vict. c. 33, passed 12th July 1837, no tolls could thenceforth be demanded or taken on any turnpike road for horses and carriages employed in or about the conveyance of mails, "except where such horses or carriages were legally chargeable with toll" before that date. And by the contemporary Act, 1 Vict. c. 36, s. 9, penalties were prescribed against collectors of tolls at turnpike gates or bars on highways, bridges, post roads, and other places, who should demand tolls for mails, or obstruct or delay the passage of mails, and likewise against ferrymen committing similar acts. The practical effect of those enactments was the complete immunity of mails from tolls throughout the United Kingdom. In 1886 the Northam Bridge Company attempted by petition of right to obtain payment of tolls on mails passing over their bridge, but upon demurrer by the Attorney-General judgment was given in favour of the Crown (*Times*, November 24, 1886).



One of the most important consequences of the working of the Post Office by the State is that the Postmaster-General, as an officer of the Crown, is not legally responsible for the negligence or misconduct of his subordinate officers in the execution of their public duties, and for which wrongful acts those persons individually are alone responsible (*Lane v. Cotton*, 1 Salk. 17; *Whitfield v. Lord De Spenser*, Cowp. 765). The rigorous effects of this immunity as regards the loss of post letters and their contents, have to some extent been mitigated in recent years by Treasury regulations providing for the registration of postal packets, and allowing compensation to a limited amount in cases of registered packets containing valuable articles. It has been judicially decided that the Postmaster-General is not bound by a mistake made by a post office clerk in the amount of charge for the transmission of telegrams, and that the sender remains liable to the department for any deficiency between the sum actually paid and the proper authorised charge (*Postmaster-General v. Green*, 1887, 3 T. L. R. 780).

In respect of rights and liabilities *ex contractu*, the Postmaster-General is in the same position as other officers of the Crown contracting on behalf of Her Majesty.

The Postmaster-General for the time being is by Act 3 & 4 Vict. c. 96, s. 67, constituted a body corporate "to hold and take conveyances and leases of messuages, tenements, lands, and hereditaments for the service of the Post Office." He is likewise empowered by Act 26 & 27 Vict. c. 43, with the consent of the Treasury, to sell and exchange lands. Moreover, compulsory powers of purchasing specific lands (under the provisions of the Lands Clauses Consolidation Acts) have from time to time been conferred upon him by several statutes, the latest of which is the Post Office (Sites) Act, 1897. Post office buildings, etc., are, like other Crown property, not liable to be rated and taxed by local authorities (*Smith v. Birmingham Guardians*, 1857, 7 El. & Bl. 483). Other property belonging to the Crown and used for Post Office purposes is similarly free from liabilities imposed by statute, unless the contrary is expressly enacted, *e.g.* weights and measures used by a post office receiver (a person in trade) cannot be tested and condemned under the Weights and Measures Act, 1878, s. 25 (*R. v. Justices of Kent*, 1890, 24 Q. B. D. 181).

For the protection of persons acting in the execution of the Post Office Acts it is provided by sec. 46 of 1 Vict. c. 36, that all legal proceedings, whether by action or by prosecution, which shall be commenced against any person for anything done in pursuance of or under the Post Office Acts, shall be commenced and prosecuted within three calendar months next after the commission of the act, and not afterwards.

### III. OFFENCES AGAINST THE POST OFFICE LAWS.

(a) *Offences punishable on summary conviction by penalties or fines recoverable by distress, and in default imprisonment:—*

Any person conveying or sending otherwise than by post, or causing to be so sent or conveyed, a letter not exempted from exclusive privilege of Postmaster-General, or performing otherwise than by post any services incidental to conveying such letters from place to place, or making a collection of exempted letters for the purpose of conveying the same (1 Vict. c. 33, s. 2).

Any master of a vessel outward bound refusing to take a mail tendered to him for conveyance, or opening or taking a letter from a mail, or not duly delivering a mail (*ibid.* s. 6, and 3 & 4 Vict. c. 96, s. 37).



Any person employed to carry, convey, or deliver post letter bags or post letters losing same, or being guilty of drunkenness, negligence, or misconduct, and thereby endangering or delaying mails (*ibid.* s. 7).

Any collector of tolls, ferryman, gatekeeper, etc., demanding toll for mails, or stopping or delaying mails (*ibid.* s. 9).

Any person fraudulently removing from any post letter a postage stamp or postmark with intent to use same for some other letter, or doing certain other specific acts with intent to defraud the postal revenue (3 & 4 Vict. c. 96, s. 23).

Any company, corporation, or person transmitting or receiving, collecting or delivering any telegram in contravention of Postmaster-General's exclusive privilege (32 & 33 Vict. c. 73, s. 6).

Any undertakers, body, or person empowered by Act of Parliament to execute some work destroying or injuring any telegraphic line of the Postmaster-General, if telegraphic communication is thereby carelessly or wilfully interrupted (41 & 42 Vict. c. 76, s. 8); or obstructing the Postmaster-General or his agents in placing, maintaining, altering, examining, or repairing any telegraphic line (*ibid.* s. 9).

Any person affixing or attempting to affix without due authority a placard, board, or thing on any post office, letter box, telegraph post, or other property of the Postmaster-General, or painting or disfiguring the same (47 & 48 Vict. c. 76, s. 5).

Any person making, issuing, or using any envelope, wrapper, card, etc., or stamps or marks in imitation of post office envelopes, forms, stamp, or marks (*ibid.* s. 6).

Any person making, uttering, knowingly using, or having in possession without lawful excuse any fictitious stamp, or instruments for making same (*ibid.* s. 7; see *Dickins v. Gill*, [1896] 2 Q. B. 310).

Any person placing or maintaining without due authority on any house, wall, window, or place the word "post office," etc. (*ibid.* s. 8).

Any person wilfully obstructing post office officials or business (*ibid.* s. 9).

[*N.B.*—Certain misdemeanours created by the statute last cited, and herein included under the head of *Indictable Offences, post*, and there distinguished by an asterisk \*, are also triable summarily.]

Any person on board a British mail ship conveying any letter for delivery except mails sent by post (54 & 55 Vict. c. 31, s. 2).

Abettors in post office offences triable summarily are liable to the same penalties and punishment as the principal offenders (1 Vict. c. 36, s. 11).

(b) *Indictable Offences.*—Any person employed under the Post Office, opening or detaining or delaying a post letter contrary to his duty [Misdemeanour; imprisonment or fine] (1 Vict. c. 36, s. 25).

Any person employed under the Post Office stealing or embezzling, secreting or destroying a post letter [Felony; penal servitude; and if such post letter contain any chattel, or money, or valuable security, the maximum punishment is penal servitude for life] (*ibid.* s. 26).

Any person stealing from or out of a post letter any chattel, money, or valuable security, or stealing a post letter bag, or a post letter from a post office or from a mail, or stopping a mail with intent to rob or search same [Felony; penal servitude for life] (*ibid.* ss. 27, 28; see *R. v. James*, 1890, 24 Q. B. D. 439).

Any person stealing or unlawfully taking away a post letter bag sent by a post office packet, or a letter out of such bag, or unlawfully opening such bag [Felony; penal servitude] (*ibid.* s. 29).



Any person receiving any property the stealing, etc., whereof would be a felony under Post Office Acts, knowing the same to have been stolen, etc. [Felony] (*ibid.* s. 30).

Any person fraudulently retaining after delivery thereof by mistake any post letter or wilfully secreting or detaining any misdelivered letter or mail [Misdemeanour; imprisonment or fine] (*ibid.* s. 31).

Any person soliciting or endeavouring to procure the commission of any crime under Post Office Acts [Misdemeanour; imprisonment] (*ibid.* s. 36).

Any person forging or fraudulently using any die or plate denoting postal rates or duties, or unlawfully manufacturing or using paper similar to that used for postage stamps, etc. [Felony; penal servitude] (3 & 4 Vict. c. 96, ss. 22, 29).

Any person unlawfully receiving or possessing paper provided for use for postage stamps, etc., before being duly stamped and issued [Misdemeanour; imprisonment] (*ibid.* s. 30).

Any officer of the Post Office granting or issuing any money order with a fraudulent intent [Felony; penal servitude] (11 & 12 Vict. c. 88, s. 4). This enactment is extended to postal orders, and these instruments are brought within the Forgery Act, 1861, and the Larceny Act, 1861, by 43 & 44 Vict. c. 33, s. 4.

Any person employed under or acting for the Post Office disclosing, making known, or intercepting contents of a telegram contrary to his duty [Misdemeanour; imprisonment] (31 & 32 Vict. c. 110, s. 20).

\* Any person placing or attempting to place in or against any post office letter box, any fire, match, light, explosive or dangerous substance or filth, or doing anything likely to injure such box or its contents [Misdemeanour; imprisonment or fine] (47 & 48 Vict. c. 76, s. 3).

\* Any person sending or attempting to send a postal packet enclosing explosive, dangerous, or deleterious substance, or indecent or obscene print or article, or having thereon any words, etc., of indecent, obscene, or offensive character [Misdemeanour; imprisonment or fine] (*ibid.* s. 4).

\* Any person forging or wilfully and without due authority altering a telegram, or uttering forged telegram, or transmitting a false telegram [Misdemeanour; imprisonment or fine] (*ibid.* s. 11).

\* Any person in employ of a telegraph company improperly divulging purport of any telegram [Misdemeanour; imprisonment or fine] (*ibid.*).

Any person not in the employment of the Post Office maliciously, and with intent to injure any other person, opening, or causing to be opened, a letter intended for, and addressed to, any other person, or doing anything to prevent or impede the delivery of such a letter [Misdemeanour; fine or imprisonment. Section does not apply to a parent or guardian of the addressee of letter] (54 & 55 Vict. c. 46, s. 10).

Accessories to felonies (whether before or after the fact, except receivers), and aiders and abettors to misdemeanours punishable under the Post Office Acts, are indictable and punishable as principal offenders (1 Vict. c. 36, s. 35).

Numerous other offences committed by Post Office servants and other persons in connection with the postal service, but which are not the subject of special provisions in the Post Office Acts, are prosecuted by the department under the general law, *e.g.* embezzlement, forgery of orders, receipts, etc., conspiracy to defraud, simple larceny, obtaining money or goods by false pretences, etc. A forged telegram not in itself being one of the specific instruments mentioned in the Forgery Act, 1861, has been held (C. C. R.) to be a "forged instrument" within sec. 38 of that Act (*R. v.*



*Riley*, [1896] 1 Q. B. 309). All prosecutions instituted by the Postmaster-General are under the general direction of the solicitor to the Post Office, and cases at assizes and sessions are conducted by counsel appointed by the Attorney-General, the indictments being settled by the pleader likewise appointed.

**Post Office Orders.**—Two kinds of orders for money are issued by the Post Office, namely, money orders and postal orders. Money orders are issued for any amount up to £10, and postal orders for fixed amounts from one shilling up to £1. A money order or postal order may, under the regulations of the Post Office, be crossed like a cheque; and payment of any order so crossed will only be made through a banker; and if the name of a banker is added, then through that banker. And it is provided by the regulations that, when a money order is presented through a bank, duly crossed with the name of such bank, by a person known to be in its employment, the usual formalities observed on presentation in the ordinary way will be dispensed with. It has been held that these regulations do not make a money order presented through a bank a negotiable instrument, so as to protect the banker from liability for receiving payment of the order on behalf of a person having no title to it (*Fine Art Society v. Union Bank*, 1886, 17 Q. B. D. 705). Postal orders are described on the face as “not negotiable,” and therefore, although they are assignable after having been receipted by the payee, apparently they are also subject to the ordinary rule of law (expressed in the maxim “*Nemo dat quod non habet*”), that no person can give to another a better title than he has himself. After once paying a money or postal order, by whomsoever presented, the Post Office is not liable to any further claim.

**Potwaller; Potwalloper.**—A potwaller, or, as it has sometimes been termed, a potwalloper, is an individual, either a householder or lodger, who furnishes and cooks his own food at his own fireplace. Such persons were entitled to the parliamentary electoral franchise in certain cities and boroughs before 1832.

“Potwalloper,” meaning literally one who boils a pot, is defined in *Webster’s Dictionary* as a voter in certain boroughs of England, where, before the passage of the Reform Bill of 1832, the qualification for suffrage was to have boiled (walloped) his own pot in the parish for six months (see also Skeat, *Etymological Dict. of Eng. Language*).

The Representation of the People Act, 1832, in placing the parliamentary franchise on a statutory basis, expressly reserved certain ancient franchises existing in boroughs and cities at the time of the passing of the Act (*i.e.* the 7th June 1832). Among the persons to whom the right of voting at elections of members for cities or boroughs was temporarily reserved were electors who were at the time of the passing of the Act qualified in respect of residency as “potwallers,” provided that they were qualified as electors according to the usages and customs of the city or borough, or any law in force at the time of the passing of the Act (see the Representation of the People Act, 1832, s. 33; see also 26 Geo. III. c. 100).

In the *Taunton* case ((*Curry’s case*), 1838, Falc. & Fitz. at p. 311) it was held that the ancient and reserved right of voting in the election of members to serve in Parliament for the borough of Taunton was in inhabitant potwallers having a settlement and not having received alms



or charity within a year before the election, and that a potwaller, according to the usage of the borough, was one, whether he be a householder or lodger, who has the sole dominion over a room with a fireplace in it, and who furnishes and cooks his own diet at his own fireplace, or at some other place within the same house at which fireplace he had a legal right so to do, and who has actually cooked his diet at such fireplace; to entitle such potwaller to vote, he must also have resided within the borough for six months previous to the day of election according to the Statute 26 Geo. III. c. 100.

In the same case it was held that when a potwaller had retained the room in respect of which he had been registered, but had resided for several months previous to the election out of the borough, his vote was bad (*Davey's case*, *ibid.* at p. 313; see also *Allen v. House*, 1845, 7 Man. & G. 157).

The subject is now of historic rather than of practical interest, for there are extremely few, if any, persons now on the parliamentary register as entitled to the franchise under this ancient reserved right (see the Return of Parliamentary Constituencies (Electors, etc.), Parliamentary Paper No. 131 of 1897). On the register for 1896 there was one inhabitant householder qualified as a potwaller (see Return of Parliamentary Constituencies (Electors, etc.), Parliamentary Paper No. 76 of 1896). It is, however, possible, as has been pointed out, that some of the ancient franchises may be in abeyance owing to the persons entitled to them being in receipt of parochial relief (see Rogers on *Elections*, 16th ed., 1897, vol. i. "Registration," p. 171, note (b); see also the Parliamentary Voters Registration Act, 1843, 6 & 7 Vict. c. 18, s. 78).

See FRANCHISE (ELECTORAL); REGISTRATION OF VOTERS.

**Poundage.**—*History.*—In former times customs payable upon exports and imports were distinguished into subsidies, tonnage, poundage, etc. Of these, tonnage and poundage were originally granted for the defence of the realm, by keeping and safeguarding the seas, so that merchandise might safely enter and pass out of the country. At first they seem to have been granted only for stated terms, as for two years in the fifth year of Richard II.; but an Act of the 31 Hen. VI. 1452 gave them to the king for life. To Edward IV. and his successors, down to Charles I., they were also granted for life; but in the reign of the last-mentioned monarch the usual grant was omitted. For fifteen years, nevertheless, they were levied without consent of Parliament; but by 16 Car. I. (1640), c. 8, the Crown renounced the rights to levy these duties without consent of Parliament. After the Restoration the grant for life was again made, both to Charles II. and his two next successors; but during that period the Commons got more and more control of the public funds, and by 9 Anne (1710), c. 6; 1 Geo. I. (1714), c. 12; and 3 Geo. I. (1716), c. 7, these duties were made perpetual, and made security for the national debt. The Customs Consolidation Act, 1787 (27 Geo. III. c. 13), inaugurated a new era, and since that Act it has been the practice for Parliament from time to time to pass measures fixing what duties shall be leviable upon merchandise imported or exported. There is a long list of such enactments. It is right to add that originally poundage was imposed *ad valorem* at the rate of twelve pence in the pound on all merchandise whatsoever.

*Modern Law.*—At the present day, an important charge, called poundage, is deducted from the pound by sheriffs as part of their remuneration. At common law these officers were bound to execute the Crown writs without fee or reward, but the Statute 29 Eliz. (1586), c. 4, now repealed by the Sheriffs Act, 1887, 50 & 51 Vict. c. 55, s. 39, gave them the right to exact poundage. Now, by the R. S. C., 1883, Order 42, r. 15, in every case of execution the party entitled to execution may levy the poundage fees and expenses of execution over and above the sum recovered



(cp. Crown Office Rules, 1886, r. 222). So by the Sheriffs Act, 1887, *supra*, s. 20, subs. 1, a sheriff is entitled, in respect of all sums due to the Crown, and collected by him under process of any Court, to an allowance upon his accounts of 1s. 6d. in the pound for every sum not exceeding £100, and 1s. for every pound exceeding the first £100. By subsec. 2, for the execution of other process than that just mentioned, such fees are exactable as the Lord Chancellor, with the advice of the judges may fix; and under this sub-section, on 31st August 1888, the judges issued an order fixing the fees for writs of *fi. fa.* With respect to poundage, that order states that the fee for delivery of the writ to the undersheriff, and the sheriff's poundage, shall remain as before, that is to say, 1s. in the pound if the sum levied does not exceed £100, and 6d. for every pound over and above that sum (cp. s. 39, subs. 5 of the Act). No other reward is to be taken by the sheriff beyond the fees so fixed (subs. 3); and if a sheriff dies, his successor must account to his estate for a proportion of the fees, etc., calculated on the amount of trouble each may have had (subs. 4). Sheriffs' poundage on writs of *ca. sa.* were abolished by 5 & 6 Vict. c. 98, s. 31).

The sheriff's poundage is calculated on the sum received under the execution only, and not on the amount claimed or seized (*R. v. Robinson*, 1835, 2 C. M. & R. 334). If a portion of what is realised by his sale is paid away, as to a landlord for rent, that will not affect the amount of his poundage (*Davies v. Edmonds*, 1843, 12 Mee. & W. 31). An unintentional overcharge for poundage due to a clerical error is not an extortion for which a penalty may be recovered under the Sheriffs Act, 1887, *supra*, s. 29 (*Shoppee v. Nathan & Co.*, [1892] 1 Q. B. 245). If, however, a sheriff sells under a *venditioni exponas*, he may not deduct anything for poundage, but must make a return of the gross sum, when the Court will order it to be paid over, deducting poundage (*R. v. Jones*, 1814, 1 Price, 205). And a sheriff's officer cannot maintain an action against an execution creditor for expenses incurred under a writ of *fi. fa.* issued by the creditor in making inquiries as to the goods of the execution debtor (*Smith v. Broadbent & Co.*, [1892] 1 Q. B. 551). So when the bankruptcy of the judgment debtor supervenes upon seizure, but before sale by the sheriff, the sheriff is not entitled to poundage under the words "costs of execution" in subsec. 1 of sec. 46 of the Bankruptcy Act, 1883, 46 & 47 Vict. c. 52 (*In re Ludford*, 1884, 13 Q. B. D. 415). But a compromise effected by the parties before he sells will not affect his right to poundage (*Alchin v. Wells*, 1793, 5 T. R. 470), nor the fact that the execution is set aside for irregularity (*Bullen v. Ansley*, 1807, 6 Esp. 111), though if the judgment and all subsequent proceedings are set aside, that will deprive him (*Miles v. Harris*, 1862, 12 C. B. N. S. 550). Where the party with whom a sheriff deposits goods seized parts with them, the latter cannot seize them again merely for the purpose of securing his poundage, at all events if the execution was fraudulent (*Goode v. Langley*, 1827, 7 Barn. & Cress. 26). In every case where an execution is withdrawn or satisfied, the sheriff's fees and poundage shall be paid by the person issuing the execution or stopping the sale (see Order of 1888; see further, EXECUTION, vol. v. p. 132).

So, too, on a writ of *elegit* a sheriff, to be entitled to poundage, must have actually extended land, and if there are several writs, and poundage has been allowed one, he will not be entitled to any on subsequent writs of the same creditor, though under different judgments (*Carter v. Hughes*, 1858, 27 L. J. Ex. 225). But where two extents issue into different counties, the sheriff who completes his levy is entitled to full poundage (*R. v. Caldwell*, 1792, 1 Anst. 279), even though the debt is voluntarily paid to him (*R. v. Fry*, 1793,



2 Anst. 358). There is no right to levy poundage, however, under an extent on a simple contract debt (*R v. Tidmarsh*, 1817, 5 Price, 189), nor out of money levied upon an attachment for non-payment of money (*R. v. Palmer*, 1802, 2 East, 411).

Income tax collectors were formerly remunerated by poundage, but the Income Tax (Public Offices) Act, 1872 (35 & 36 Vict. c. 82), abolished poundage for the collection of income tax in public departments, and substituted salaries; and 54 & 55 Vict. (1891), c. 13, s. 1, abolished the poundage to which the clerks to the Commissioners of Income Tax and the assessors were entitled by the Taxes Management Act, 1880 (43 & 44 Vict. c. 19, ss. 41 (2), 47, 80, and Sched. 1).

**Pound; Pound-breach.**—A place for the detention of the animals of others lawfully seized. A legal right to seize and impound such animals arises—

- (i.) In the case of distress for rent (see DISTRESS, vol. iv. at p. 303).
- (ii.) Where the animals are found *damage feasant* on the land of the person seizing (see DISTRESS, vol. iv. p. 306).
- (iii.) In the case of ESTRAYS.
- (iv.) In the case of a writ or other legal process authorising seizure, whether by an officer or by a private person.

The animal must be detained in a pound to which the owner can have access to give it food and water (Stat. Exch. 1 Rev. Stat., 2nd ed., 75), and may not be sold within fifteen days of seizure; nor may a charge be made for its keep. Under the Statute of Marlbridge (52 Hen. III. c. 4), a distress must not be driven out of the county in which it is taken (2 *Co. Inst.* 106); and under 1 & 2 Phil. & Mary, c. 12, it must not be driven out of the hundred, except to a pound overt in the same county. But breach of the statute does not make the distrainer a trespasser (*Gimbart v. Pelah*, 1747, 2 Stra. 1272). Animals distrained at one time must be impounded in one place (1 & 2 Phil. & Mary, c. 12).

The proper place for impounding cattle is a public open pound made for the purpose, if there is a proper and convenient one in the neighbourhood. Since the inclosure of the country, the provision of such pounds has been greatly neglected, and in the case of distresses for rent it is now legal to detain the animals on any inclosed land of the distrainer. But in the case of distress damage feasant it seems still necessary, if possible, to impound in the manorial or other public pound, where the animal is in the custody of the law and not of the party (*Green v. Duckett*, 1883, 11 Q. B. D. at p. 280). Till this is done, the owner can demand the animal back on tender of amends. When it is done he must replevy the animal. Where the pound is covert or close, *i.e.* in a part of the distrainer's premises to which the owner has no legal right of access, the distrainer must feed the animals (1 *Co. Inst.* 47). Common pounds are under the charge of a finder or pound-keeper, who must receive every animal brought to be impounded, irrespective of the legality of the seizure (*Badkin v. Powell*, 1776, Cowp. 476). The fees for impounding are limited by 1 & 2 Phil. & Mary, c. 12, s. 2, to 4d. for any one whole distress, and contrary usages or prescriptions are abolished. To take more is extortion (*Badkin v. Powell*, *ubi supra*; *Green v. Duckett*, *ubi supra*).

Under the Prevention of Cruelty to Animals Act, 1849 (12 & 13 Vict. c. 92, ss. 5, 6), the person who causes animals to be impounded must, under penalty, while confinement continues, provide a sufficient quantity of fit and



wholesome food; but this obligation does not extend to the pound-keeper (*Dargan v. Davies*, 1877, 2 Q. B. D. 118).

The impounder who discharges this obligation may recover not more than double the cost from the owner by summary proceedings, or seven clear days after impounding may sell the animal (after three days' public printed notice) in a public market for the best price obtainable. The proceeds, after paying the cost of food and sale, are paid over to the owner.

If impounded animals are left unfed for twelve hours, any person, whether owner or not, may enter the pound and feed them and charge the cost to the owner of the animal, which may be detained till payment (12 & 13 Vict. c. 92, s. 6). Persons who interfere with or obstruct pound-keepers acting under the above provisions are liable to summary conviction (s. 20).

Local authorities in London are empowered to establish a green yard (a pound in all but name), to which to take animals and goods found unclaimed in public places (*Badkin v. Powell*, 1776, Cowp. 476; 57 Geo. III. c. xxix. s. 109).

In districts to which the Towns Police Clauses Act, 1847 (10 & 11 Vict. c. 89), applies (see 38 & 39 Vict. c. 55, s. 171), the police are entitled to impound stray cattle in any common pound (which may be provided by the district council) until a penalty, not exceeding forty shillings and the cost of keep, is paid to the district council. If payment is not made in seven days, the cattle may be sold. This provision is in addition to the penalties for permitting animals to stray on HIGHWAYS.

The release of cattle lawfully impounded, or damaging or destroying the pound with that object, is the offence of pound-breach, and appears still to be an indictable misdemeanour (1 *Co. Inst.* 47; *R. v. Butterfield*, 1892, 17 Cox C. C. 598), but is usually punished on summary conviction—

(i.) As to pounds within the Towns Police Clauses Act, 1847 (10 & 11 Vict. c. 89, s. 26), by imprisonment for not over three months.

(ii.) As to rescue before or after impounding of cattle distrained when straying or damage feasant (6 & 7 Vict. c. 30). The justices cannot try the charge if questions of title to land arise, or as to obligations to maintain fences and the like, or questions of bankruptcy.

**Pour faire proclamer**—An ancient writ addressed to the mayor or bailiff of a city or town, requiring him to make proclamation that none cast filth into the ditches or places near such city or town, to the nuisance thereof; and if any be cast there already, to remove the same. It was founded on the Statute 12 Rich. II. c. 13, which was repealed by 19 & 20 Vict. c. 64, and S. L. R. 1875.

**Power of Attorney.**—A power of attorney is an authority given by a formal instrument under seal, whereby one person, who is called the donor or principal, authorises another person, who is called the donee, attorney, or agent, to act on his behalf. A general power of attorney is one by which authority is given to act for the principal in all matters, or in all matters of a particular nature, or concerning a particular business. A special power of attorney is one by which authority is given to do some particular specified act. The law relating to powers of attorney is a branch of the law of agency.



*Capacity of Parties.*—The capacity to appoint an attorney is, as a general rule, coextensive with capacity to contract. A power of attorney given by an infant is, except as provided by the Conveyancing Act, 1881 (cited below), void (*Zouch v. Parsons*, 1765, 3 Burr. 1794, 1804; *Combe's case*, 9 Co. Rep. 75). The same rule applies to a power of attorney given by a lunatic, subject to the qualification that if he is apparently sane he will be bound by the acts of the attorney, done in pursuance of the power, with respect to any third person who, without notice of the insanity, deals with the attorney for valuable consideration on the faith of the power (*Elliot v. Ince*, 1857, 7 De G., M. & G. 475; *Ex parte Bradbury*, 1839, Mont. & Chit. 625). Formerly, a married woman was not competent to appoint an attorney, but the 40th section of the Conveyancing Act, 1881, provides, with respect to deeds executed after the commencement of the Act, that a married woman, whether an infant or not, shall have power, as if she were unmarried and of full age, by deed to appoint an attorney on her behalf for the purpose of executing any deed or doing any other act which she might herself execute or do. Any person of sound mind is competent to act as an attorney. The act of an agent is deemed to be the act of the principal who authorised it, the agent being looked upon as a mere instrument, and it is therefore not necessary that the agent should be *sui juris*, or competent to act or contract on his own behalf. As to the acts which may be done through or by means of an agent or attorney, see PRINCIPAL AND AGENT.

*Form and Execution of the Instrument.*—The instrument creating a power of attorney may be either a deed-poll or an indenture. It is not necessary in the case of an indenture that the attorney should be a party to it (*Moyle v. Ewer*, Cro. (1) 905), and a power of attorney is frequently given by a clause in an instrument containing other matters. The execution by the principal is generally, and in some cases (*e.g.* in the case of a power of attorney to transfer stock in the books of the Bank of England) must be, attested by two witnesses. A forged power of attorney is wholly inoperative with respect to the person by whom it purports to have been executed, and no right or title can be acquired under or by means thereof as against him (*Marsh v. Keating*, 1834, 1 Bing. N. C. 198; *Bank of Ireland v. Evans' Trustees*, 1855, 5 Cl. H. L. 389; *Merchants of Staple v. Bank of England*, 1888, 21 Q. B. D. 160).

*Extent of Authority conferred.*—Powers of attorney are construed strictly, and give such authority only as they confer expressly or by necessary implication (*Bryant v. La Banque du Peuple*, [1893] App. Cas. 170). Where a resident director and manager of a mining company was authorised "to direct the mine so as most effectually to promote the interests of the company, to employ workmen, provide needful implements, etc.," it was held that he had no authority to bind the company by accepting bills of exchange (*Brown v. Byers*, 1847, 16 Mee. & W. 252). So, a power of attorney given by an executor "to transact in his name all the affairs of the testator" does not authorise the acceptance of a bill of exchange in the name of the executor so as to bind him personally (*Gardner v. Baillie*, 1796, 6 T. R. 591; 3 R. R. 531, 538). And a power "from time to time to negotiate, make sale, dispose of, assign, and transfer" gives no authority to pledge (*Jonmenjoy Coondoo v. Watson*, 1884, 9 App. Cas. 561; *De Bouchout v. Goldsmid*, 1800, 5 Ves. Jun. 211). A power "to sell, indorse, and assign" has, however, been construed as giving (1) authority to sell, (2) authority to indorse, and (3) authority to assign, and therefore as authorising an indorsement as security for a loan to the attorney (*Bank of Bengal v. Macleod*, 1849, 5 Moo. Ind. Ap. 1; *Bank of Bengal v. Fagan*, 1849, 5 Moo. Ind. Ap. 27). The operative part of the deed may be controlled by the recitals. Thus, where it was



recited that the principal was going abroad, and the operative part gave authority in general terms, it was held that the authority subsisted only during his absence abroad (*Danby v. Coutts*, 1885, 29 Ch. D. 500).

General words in a power of attorney do not confer general powers, but are restricted to what is necessary for the proper execution of the special powers (*Perry v. Holl*, 1860, 2 De G., F. & J. 38), and are construed as enlarging the special powers when necessary, and only when necessary, for the accomplishment of the purpose for which the authority is given (*Lewis v. Ramsdale*, 1886, 55 L. T. 179; *Attwood v. Munnings*, 1827, 7 Barn. & Cress. 278; *Harper v. Godsell*, 1870, L. R. 5 Q. B. 422). A power "to demand and receive all moneys due to the principal on any account whatsoever, and to use all means for the recovery thereof, to appoint attorneys to bring actions, and to revoke such appointments, and to do all other business," does not authorise the attorney to indorse a bill of exchange received by him under the power, the words "all other business" being construed as meaning all other business necessary for, or in connection with, the recovery of the moneys (*Hogg v. Snaith*, 1808, 1 Taun. 347; 9 R. R. 788; *Hay v. Goldsmidt*, 1804, 1 Taun. 349; 9 R. R. 790; *Esdaile v. La Nauze*, 1840, 1 Y. & C. Ex. 394; *Murray v. East India Co.*, 1821, 5 Barn. & Ald. 204).

The deed will be construed so as to include all medium powers necessary for its effective execution, and as authorising all acts which are incidental to the execution of the express powers in the ordinary way (*Withington v. Herring*, 1829, 5 Bing. 442; *Howard v. Baillie*, 1796, 2 Black. H. 618; 3 R. R. 531; *Willis v. Palmer*, 1860, 7 C. B. N. S. 340; *Henley v. Soper*, 1828, 8 Barn. & Cress. 16; *In re Wallace*, 1884, 14 Q. B. D. 22). See also PRINCIPAL AND AGENT (*Implied Authority*).

*Execution of the Power.*—It was formerly necessary that all deeds executed in pursuance of a power of attorney should be executed in the name of the principal, in order to render them binding upon him, or entitle him to sue upon them (*White v. Cuyler*, 1795, 6 T. R. 176; 3 R. R. 147; *Wilks v. Back*, 1802, 2 East, 142; 6 R. R. 409; *Berkeley v. Hardy*, 1826, 8 Dow. & Ry. K. B. 102; *Southampton v. Brown*, 1827, 6 Barn. & Cress. 718). But the Conveyancing Act, 1881, provides, by sec. 46, that the donee of a power of attorney may execute or do any assurance, instrument, or thing in and with his own name and signature, and his own seal, where sealing is required, by the authority of the donor of the power; and every assurance, instrument, and thing so executed and done shall be as effectual in law, to all intents, as if it had been executed or done by the donee of the power in the name and with the signature and seal of the donor thereof. The attorney must still, however, execute all deeds in the principal's name, if he wishes to avoid personal liability thereon. Where a person covenants under his own hand and seal for the act of another, he is personally liable, even if he describes himself as covenanting for and on behalf of such other person (*Appleton v. Binks*, 1804, 5 East, 148; 7 R. R. 672; *Cass v. Rudele*, 1692, 2 Vern. 280). As to the power of an attorney to delegate his authority, and as to the execution of a power given to two or more persons jointly, and the respective rights and liabilities of the attorney and principal as between themselves, and with respect to third persons, see PRINCIPAL AND AGENT.

*Revocation.*—Provisions are made by the Conveyancing Act, 1882, whereby powers of attorney may be rendered irrevocable in favour of purchasers for valuable consideration. The 8th section provides that if a power of attorney, created by an instrument executed after December 31, 1882, and given for valuable consideration, is in the instrument creating the power expressed to be irrevocable, then, in favour of a purchaser, it shall not



be revoked at any time, either by anything done by the donor of the power without the concurrence of the donee, or by the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor; and any act done at any time by the donee in pursuance of the power shall be as valid as if anything done by the donor without his concurrence, or the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor, had not been done or happened; and neither the donee nor the purchaser shall at any time be prejudicially affected by notice of anything done by the donor without the concurrence of the donee, or of the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor. The 9th section makes similar provisions with regard to a power of attorney, whether given for valuable consideration or not, which is in the instrument creating the power expressed to be irrevocable for a fixed time therein specified, not exceeding one year from the date of the instrument. In protection of persons making payments and doing acts in pursuance of a power of attorney without notice of the revocation thereof, the 47th section of the Conveyancing Act, 1881, provides that any person making or doing any payment or act in good faith, in pursuance of a power of attorney, shall not be liable in respect of the payment or act by reason that before the payment or act the donor of the power had died or become lunatic, of unsound mind, or bankrupt, or had revoked the power, if the fact of death, lunacy, unsoundness of mind, bankruptcy, or revocation was not at the time of the payment or act known to the person making or doing the same. But the section is not to affect any right against the payee of any person interested in any money so paid; and such person has the like remedy against the payee as he would have had against the payer if the payment had not been made by him. Subject to the above statutory provisions, the law with regard to the revocation of a power of attorney, and the determination of the attorney's authority, is the same as the law with regard to the revocation and determination of the authority of agents generally, as to which see PRINCIPAL AND AGENT. A power of attorney may be revoked by a verbal notice of revocation (*The Margaret Mitchell*, 1858, Swa. Ad. 382; *R. v. Wait*, 1823, 11 Price Ex. 518).

Provision is made by the 48th section of the Conveyancing Act for the deposit at the Central Office of instruments creating powers of attorney, and for the inspection and delivery of office copies of instruments so deposited.

As to the stamping of powers of attorney, see Schedule to Stamp Act, 1891, and secs. 80 and 81 thereof, and sec. 11 of the Finance Act, 1895.

### Power of the County.—See POSSE COMITATUS.

### Powers.

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*Introductory.*—The subject of this article is that of the monumental works of Lord St. Leonards (8th ed., 1861) and Mr. Chance (1841), and the more recent and very valuable treatise by Mr. Farwell, Q.C., of which the second edition appeared in 1893. Here only the outlines of the subject and of its greater subdivisions can be drawn, and for most practical purposes the reader can in this article only be directed to others in this work, and generally to the above-mentioned authors, for answers to the questions with which he may need to grapple.

*Technical Meaning.*—The word “power” is used by conveyancers to denote an authority which one private person—technically called the donor—gives to another—technically called the donee. Every contract of agency, indeed, comprises the gift of a power, and one of the most formal modes of constituting an agent is that of giving him what is called a “power of attorney.” Powers of attorney and agency, however, are not treated of in this article, the subjects of which are powers to dispose of, or, in technical language, appoint, property or its subject-matter, and powers to appoint trustees of property.

*Classification.*—Powers to appoint property may be classified—(1) according to the parts of the law upon which they depend for their efficacy, as common law authorities, statutory powers, powers to limit uses, and powers to declare trusts; (2) according to the circumstances of the donees, as powers simply collateral, powers collateral or in gross, and powers appendant; (3) according to the character of the purposes for which they are created, as dispositive and administrative; (4) according to the scope of the authority given, as general and special or limited; and (5) according to the particular acts they authorise, such as charges of rents for jointures or of gross sums for portions, appointments among members of a class, sales, leases, investments, and many other acts.

*Common Law and Statutory Powers and Powers to appoint Uses and Trusts.*—Of the four classes of powers distinguished by the different parts of the law on which they are dependent, common law authorities and statutory powers stand historically first and last in the series, but they are alike in operating, though they are conveyances, independently of uses and trusts. The usual illustration of a common law authority is a declaration that a testator’s executor may sell his land, which is sometimes found in very simple or inartificially drawn wills of freehold land, and more often in artificially drawn wills of copyhold land. It is with powers which operate on uses that the bulk of the old learning on powers is concerned; but powers which operate on trusts probably constitute the greater number of those now in existence. Many of them are in forms known as discretionary trusts. Statutory powers have been given by the Lands Clauses Consolidation Acts, 1845, Lord Cranworth’s Act, 1860, the Settled Estates Act, 1877, the Law of Property and Conveyancing Acts, 1881 and 1882, the Settled Land Acts, 1882 to 1890, the Copyhold Acts, and others. It may be said that these powers are not conferred by one private person on another, but in most of, though not in all, those cases a private settlement imports the operation of the statute.



*Powers Simply Collateral, In gross and Appendant.*—Powers simply collateral are powers to convey land or, perhaps (15 Ch. D. 232), other property, given to persons who have no estate or interest in that which they are empowered to convey. A common law authority to sell land, given to an executor, is such a power, as also were the powers of sale, etc., formerly conferred by real property settlements on the grantees to uses. Powers collateral or in gross—the latter being the epithet more frequently used—are powers given to persons having a limited estate or interest in some specified land to convey an estate or interest subsequent to their own in that land. Such are powers given or reserved to tenants for life to charge with jointure annuities for their widows, and with money for portions for their children, and, if the term be used of powers over personalty, the common powers given to parents to appoint the settled fund among their issue. Powers appendant are powers which an owner may exercise over property in which he takes an estate or interest, and so as to affect that estate or interest, and also, possibly, if his estate be a limited one, subsequent estates or interests. Powers of sale, exchange, partition, and leasing, when conferred on tenants for life, are appendant powers.

*Administrative and Dispositive Powers.*—The classification of powers as administrative and dispositive, though it may not have been largely recognised, is founded on a great difference between the purposes for which powers are created. Administrative powers are created in order to enable the donees to manage the subject of property upon which the powers are to be exercised for the benefit of the owners of that property, in some cases including, and in others not including, the donees of the powers. Dispositive powers enable the donees to determine partially or wholly the subsequent ownership of the property.

*Powers, General and Special or Limited.*—This classification practically distinguishes some dispositive powers from all other such powers. All administrative powers, however wide their scope, are limited by the duty of the donee in every case to exercise his power, not for his own benefit only if he may do so at all, but for that of all the beneficiaries, including himself only if he be a beneficiary. A general power enables the donee to give the whole subject of the power to whomsoever he pleases, including himself, if it be made capable of exercise by act *inter vivos*. A special or limited power may differ from a general one in authorising the donee to give a limited estate or interest only, but the difference, which is usually connoted by the term special or limited, is that the power authorises disposition in favour of some specified person or persons or class of persons only. The peculiarities of a general power are further treated of below.

*Powers to accomplish Particular Purposes.*—For accounts of the particular powers which are usually or frequently inserted in, or are now by statute imported into, settlements, reference must be made to the following articles in this work, that is to say, for Administrative Powers—

|                                     |   |                        |
|-------------------------------------|---|------------------------|
| Management of land,                 | } | see SETTLED LAND ACTS. |
| Sale,                               |   |                        |
| Exchange,                           |   |                        |
| Partition,                          |   |                        |
| Enfranchisement,                    |   |                        |
| Leasing,                            |   |                        |
| Acceptance of surrenders of leases, |   |                        |
| Renewal of renewable leases,        |   |                        |
| Grants of licences to demise,       |   |                        |
| Mortgage,                           |   |                        |



General Authorities to Trustees—

- |                                |   |             |
|--------------------------------|---|-------------|
| To compromise debts,           | } | see TRUSTS. |
| To give receipts,              |   |             |
| To apportion blended funds,    |   |             |
| To invest in specified manner, |   |             |
| To employ and pay agents,      |   |             |
| To make charges for work done, |   |             |

Dispositive Powers—

- |                                                                                 |   |                                          |
|---------------------------------------------------------------------------------|---|------------------------------------------|
| To appoint rent-charges for surviving spouses—when for widows called jointures, | } | see SETTLED LAND ACTS.                   |
| To distrain,                                                                    |   |                                          |
| To enter, etc.,                                                                 |   |                                          |
| To appoint for a term to secure rent-charges,                                   |   |                                          |
| To charge money for portions,                                                   |   |                                          |
| To appoint the portions fund,                                                   |   |                                          |
| To charge money for appointor himself,                                          | } | see POWERS IN SETTLEMENTS OF PERSONALTY. |
| To appoint income to surviving husband for life,                                |   |                                          |
| To appoint settled fund among issue,                                            |   |                                          |
| To apply income during minority in maintenance and education,                   |   |                                          |
| To apply capital for advancement,                                               |   |                                          |
| To appoint new trustees. See TRUSTS.                                            |   |                                          |

*Distinction of General Powers from, and their Equivalence to Property.*—

In order to understand the character of powers and their distinction from property, a distinction which has been recognised continuously for at least three centuries (*Sir Edward Clere's case*, 1599, 6 Rep. 17 *b*; *Buckland v. Barton*, 1793, 2 Black. H. 136; *Lord Eldon, C.*, 1804, 10 Ves. 255; *Ray v. Pung*, 1822, 5 Barn. & Ald. 561), the nature of a general power may be first considered. A general power is one whereby the donee can dispose of the property which is its subject by any means, for the benefit of any person or persons including himself, and for all or any part of that property (*Butler*, Note vii. 2 to *Co. Litt.* 271 *b*). Powers, however, which enable the donees to appoint for the benefit of whomsoever they will (*Sug. Pow.*, 8th ed., 394), or in any manner they think proper (*Wills Act*, 1837, s. 27), have the most essential characteristic of a general power, although the donees may not be authorised to exercise them otherwise than by will, and the following observations concerning general powers are applicable to powers of that description.

General powers, though authorising all dispositive acts, may be used for merely administrative purposes. They may be of common law or statutory character, and capable of exercise by way of limitation of uses or declaration of trusts. They may be appendant, in gross, or simply collateral.

The distinction between property and power is not, where the power is a general one, obvious to the common apprehension of mankind (*James, L.J.*, 1880, 16 Ch. D. 33), and the doctrine that, except in the case of a wife's separate property, power to dispose is inseparable from ownership in perpetuity, tempts a leap to the converse proposition that an absolute power of disposition implies ownership. That proposition, however, is



inexact. Present property entitles the owner to possession ; but a general power does not, though its exercise may. In most cases, indeed, its exercise does, even though that exercise fail—as it may fail, for example, by the death before the appointor of an appointee under a will—to carry the property to the appointee (*Goodere v. Lloyd*, 1830, 3 Sim. 538; 30 R. R. 214; *In re Van Hagan*, 1880, 16 Ch. D. 18; *Coxen v. Rowland*, [1894] 1 Ch. 406).

The difference is exemplified in many ways. Thus an obligation to pay money to such a person as A. shall appoint, does not, if A. die, entitle his executor to demand payment (*Pease v. Mead*, 1613, Hob. 9; *Buckland v. Barton*, 1793, 2 Black. H. 136). A husband's general power to appoint land in fee does not entitle his widow to dower (*Ray v. Pung, ubi supra*), nor, it is conceived, does such a power in a wife entitle her surviving husband to an estate by the curtesy. Personalty, which a man at his death has a general power to appoint, is not part of his estate or assets for the payment of his debts (*Wright, L.K.*, 1704, 2 Vern. 465; *Holmes v. Coghill*, 1802, 7 Ves. 499; 6 R. R. 166; *Ashby v. Costin*, 1888, 21 Q. B. D. 401); nor, until 1860, was it property in respect of which probate duty was payable. Moreover, a general power over, and an estate in fee-simple in possession in the same land, may coexist in one person (*Maundrell v. Maundrell*, 1805, 10 Ves. 246; 7 R. R. 393).

A general power, however, is so nearly equivalent to property as to have led both judges and the Legislature in several cases to treat such powers as they treat property. Thus, for the purpose of testing by the rule against perpetuities the validity of future interests appointed by the exercise of powers, the period permitted for vesting is, if the appointment be made under a special power, computed from the date of the creation of the power; if it be made under a general power, from the date of the appointment (*Sug. Pow.*, 8th ed., 394–396; *Rous v. Jackson*, 1885, 29 Ch. D. 521).

The exercise of a general power, though in favour of persons other than the donee of it, makes the appointed property available after his death and after the exhaustion of his own personalty for the payment of his debts in preference to his appointees, unless they are purchasers for value (*Thompson v. Towne*, 1694, 2 Vern. 319; *Fleming v. Buchanan*, 1853, 3 De G., M. & G. 976). The doctrine is applicable where the donee of the power is a wife (*London Bank of Australia v. Lempriere*, 1873, L. R. 4 P. C. 572), and now, whatever may have been the law before 1883 (*Vaughan v. Vanderstegen*, 1854, 2 Drew. 363, 408; *Cotton, L.J.*, 1881, 17 Ch. D. 466; *In re Roper*, 1888, 39 Ch. D. 482), makes the subject appointed liable for her debts in the same manner as her separate property, even though the power be one capable of exercise by will only (Married Women's Property Act, 1882, s. 4; *In re Ann*, [1894] 1 Ch. 549). In bankruptcy, the property of the bankrupt divisible among his creditors includes the capacity to exercise a power which at the commencement of the bankruptcy he might have exercised for his own benefit (Bankruptcy Act, 1883, s. 44 (ii.)). Moreover, the acquisition on a death of a general power confers a succession on the donee if and when he exercises it (16 & 17 Vict. c. 51, ss. 4, 33); from 1860 until the imposition of estate duty (Finance Act, 1894), personal representatives were bound to account for and pay probate duty on property appointed by their testator under a general power (23 & 24 Vict. c. 15, s. 4), and upon every death after August 1, 1894, property over which the person dying has at the time of his death a general power of appointment is property of which that person at the time of his death is



competent to dispose and so passes at his death as to entitle the Crown to estate duty (Finance Act, 1894, s. 2 (1 a)).

Formerly, conveyancers inserted general powers in ordinary purchase deeds as part of what were commonly called uses to bar dower, and in order to enable the purchaser without the concurrence of his wife to dispose of the estate free from her right to dower if she should survive him; but the Dower Act, 1833, and the subsequent lapse of time has made that practice unnecessary. Another use of such powers was in conveyances to women in order to enable them to dispose of their acquisitions independently of their husbands. The Married Women's Property Act, 1882, removed the need for that precaution. General powers, however, are still inserted in settlements, either in order to enable the donees to defeat the settlement, or to give an ultimate destination to the settled property. The most frequently occurring example of the use of a general power for the last-mentioned purpose is that which in a marriage settlement of an intended wife's property is usually given to her to dispose of the fund as she pleases, if she shall have no issue to take the property.

*Power of Revocation* is a term sometimes used to denote a power inserted in a settlement enabling the donee to determine it wholly or partially; but if the settlement be not made by the donee of the power, it may be more accurately called a power to determine. The insertion of such a power in a voluntary settlement is so far usual that its absence is a circumstance to be taken into account in deciding whether the deed ought to be sustained or set aside (Turner, L.J., 1863, 3 De G., J. & S. 491). The term, however, is most frequently used in powers to appoint to issue by deed in order to expressly authorise their exercise with or without power of revocation. Yet, in the exercise of a power without an express authority, a power of revocation and new appointment may be reserved (Sug. Pow., 8th ed., 387), and if a power be made exercisable by several persons, such as a husband and wife, or by the survivor, they may on exercising it jointly authorise themselves or the survivor to revoke and appoint again (*Brudenell v. Elwes*, 1801, 1 East, 442; 6 R. R. 310; *In re Harding*, [1894] 3 Ch. 315). Revocation without new appointment revives the original trusts and powers (*Saunders v. Evans*, 1861, 8 H. L. 721). A power of revocation is not exercised by an appointment where there is other appointable property (*Pomfret v. Perring*, 1854, 5 De G., M. & G. 775), or, though general in character, by a general devise or bequest made since 1837 (*In re Brace*, [1891] 2 Ch. 671).

*Suspension and Extinguishment of Powers.*—Much learning was formerly expended in discussing the question whether where a tenant for life made a lease out of or entirely disposed of his life estate, he did not suspend in the one case and extinguish in the other, powers conferred on him by the settlement together with his estate for life (Sug. Pow., 8th ed., 51–82), but it is understood to be now settled that such alienations neither suspend nor extinguish the tenant for life's powers, though, being unable to derogate from his own grant, he cannot, after making any such lease or alienation, so exercise his powers as to affect the interest or estate he had previously created, without the consent of the owner of that interest or estate (*Alexander v. Mills*, 1870, L. R. 6 Ch. 124; *In re Bedingfield and Herring's Contract*, [1893] 2 Ch. 332).

The power of disposition given by the Fines and Recoveries Act, 1833, to an actual tenant in tail (ss. 15, 19) appears to outlast the continuance of his estate, and the protector of a settlement retains his power after alienating the estate which gave it to him (s. 22). So the powers conferred by the



Settled Land Acts on a tenant for life do not pass to an assignee of his estate, but remain exercisable by the original tenant, though without prejudice, except in the case of certain leasing powers, to the rights of his assignees for value without their consent (Settled Land Act, 1882, ss. 50–52).

If, indeed, the donee alone, or with others, can and does dispose of the whole fee or other settled estate, his old powers are, it is conceived, extinguished, though if the transaction be by way of resettlement they may be saved (*Sug. Pow.*, 8th ed., 71).

The donee of a power can disclaim (45 & 46 Vict. c. 39, s. 6 (1)), or release it (*Sug. Pow.*, 8th ed., 88–90), even though it may be so far fiduciary that some exercises of it might be impeachable as fraudulent or improper (*In re Radcliffe*, [1892] 1 Ch. 227). Powers simply collateral were, until 1882, excepted from this doctrine, but it is now extended to them (44 & 45 Vict. c. 41, s. 52). Nevertheless, the existing authorities seem to show that where discretionary powers are given to trustees they cannot extinguish them (*Eyre v. Eyre*, 1883, 49 L. T. 561; *Saul v. Pattinson*, 1886, 34 W. R. 561; and see *Waller v. Ker*, 1866, L. R. 1 H. L. Sc. 11; but see also Chitty, J., [1896] 1 Ch. 255).

*Merger* of a power over land does not necessarily occur on the acquisition by the donee of the fee in that land. The power and the fee can coexist in one person (*Maundrell v. Maundrell*, *ubi supra*; *Sug. Pow.*, 8th ed., 93–99), but it will appear that the accession to adults of the fee or absolute interest at the end of the operation of a settlement usually determines the powers contained in it.

*The donor of a power* must, of course, be personally competent to contract and make conveyances, and be entitled to an estate or interest in, or a power over, the property to be affected sufficient to enable him to do what he purports to authorise the donee of the power to do.

*Donees*.—Anyone who is not subject to any personal disability may be the donee of a power. To what persons the several powers in common use are ordinarily given will be found stated in the articles describing those powers respectively, which are above referred to.

*Donees—Disabilities—Coverture*.—Coverture was not, even before 1883, a disability which incapacitated a wife from exercising a power given to her, if expressly or by implication the donor showed an intent that she might appoint while married, or, probably, unless a contrary intent could be inferred. The question was examined at much length by Lord St. Leonards (*Pow.*, 8th ed., 153–168) and Mr. Chance (ss. 476–562), and appears to be settled in the above-stated manner (Farwell, *Pow.*, 1st ed., 93). That a wife could not, in exercise of a power of leasing, make a good lease to her husband, was decided, not because she was incompetent to appoint, but that the intended relation of lessor and lessee could not be constituted (*Doe d. Hartridge v. Gilbert*, 1843, 5 Q. B. 423). Such a case would need reconsideration now. See savings of wives' powers in the Fines and Recoveries Act, 1833, s. 78; the like, Ireland, 1834, s. 69; 20 & 21 Vict. c. 57, s. 3; Settled Land Act, 1882, s. 61; Married Women's Property Act, 1882, ss. 1, 4.

*Infancy*.—The law concerning the competence of infants to exercise powers cannot be stated shortly and surely. An infant cannot exercise a power capable of exercise by will only (the Wills Act, 1837, s. 7). Concerning other powers, possibly the true doctrine may be that powers are not, generally speaking, capable of exercise by infants, if they require, as in most cases they do, discretion for their proper exercise; but that all powers



may be made exercisable during infancy, except some as yet undefined early part of it, if the donor so desire, and his intent clearly appear. Such a doctrine, however, even if it be deducible from the whole current of authority, has not yet been authoritatively deduced (*Sug. Pow.*, 8th ed., 177; *In re D'Angibau*, 1880, 15 Ch. D. 228; *In re Armit*, L. R. 5 Eq. 352).

*Lunacy.*—Where the donee of a power is either a lunatic so found, or any other person described in the Lunacy Act, 1890, s. 116, to whom the provisions of the Act relating to management and administration apply, the Judge in Lunacy may authorise the committee of the estate (s. 120) or other person (s. 116 (2)) to exercise specified powers (*ibid.* s. 120 (h) (b), ss. 122, 128, 129, 141).

*Repeated Exercise.*—Some powers—for example, powers of sale—cannot be exercised repeatedly over the same subject; others, such as powers of leasing, can. A power to apportion a fund among the members of a class cannot be exercised twice unless the first exercise be made revocably. A power to jointure may be exercised first in favour of one wife, and again in the event of her death and the donee's second marriage in favour of another. Probably in most cases a generally worded authority to do what may be done repeatedly authorises repeated exercises of it; but cases have occurred in which the contrary has been decided, and it is prudent, as well as usual, to expressly authorise the donee "at any time or times" to do the specified act. The Settled Land Act, 1882, declares that the powers it confers may be exercised repeatedly (s. 55).

*Priorities of Limitations in Exercise of Powers.*—An estate or interest created by the exercise of a power takes effect from the date of that exercise, as if it had been created by the instrument which conferred the power, and overreaches other limitations contained in that instrument, so far as may be necessary for the purpose of the appointment. Thus a demise made in exercise of a power by a tenant for life precedes that estate and all the remainders (*Whitlock's case*, 1608, 8 Rep. 69 *b*, 71 *a*). The object of a power of selling is to enable the donee of it to convey to a purchaser a title complete against the immediate objects of the settlement and those claiming under them (1 Sanders, *Uses*, 167). The priorities among themselves of estates and interests created in exercise of powers, and the question whether settlements should expressly provide answers for doubts concerning such priorities, or whether it may be left to the law to determine those priorities, have been debated by eminent conveyancers, but cannot be usefully treated of in this abridgment (see Butler's Note vii. 2 to *Co. Litt.* 271 *b*; 1 Sanders, *Uses*, 165–168; *Sug. Pow.*, 8th ed., 488–492, 639; 3 Dav. *Conv.*, 3rd ed., 591–593). It follows, however, from what has been stated, that the title of an appointee to the property appointed is distinct from, and takes priority of, that which, if he be also entitled in default of appointment, he derives under the latter trust (*Boyle v. Bishop of Peterborough*, 1791, 1 Ves. Jun. 299; 2 R. R. 108; *In re Vizard's Trusts*, 1866, L. R. 1 Ch. 588; *Lovett v. Lovett*, [1898] 1 Ch. 83).

*Relation of the Rule against Perpetuities to Powers.*—A power given to a person not necessarily ascertainable within the period prescribed by the rule, transgresses it and is void (*Ferrand v. Wilson*, 1845, 4 Ha. 344; *In re Hargreaves*, 1889, 43 Ch. D. 401); but the circumstance that a power may be so exercised as to transgress the rule does not make the power void, if the donee can in exercise of it appoint an interest which will vest within the permitted period (*Slark v. Dakyns*, 1874, L. R. 10 Ch. 35). The rule requires that the vesting of the interest created shall not be deferred until



after the determination of a life or lives in being at the creation of the interest and the subsequent expiration of a term of twenty-one years, and the period of gestation, if gestation exists. In the case of an interest created in exercise of a general power, it is deemed, for the purpose of the rule, to be created by the exercise of the power (Lewis on *Perpetuities*, 483); but in the case of an interest appointed in exercise of a special power, it is deemed to be created by the instrument conferring the power (*ibid.* 484). Every future interest appointed in exercise of a special power must be so limited as that it must vest within the period allowed by the rule, and computed from the date of the settlement creating the power, or if that settlement be made by will, from the death of the testator.

*Periods during which Powers may be exercised.*—The questions during what period a power is intended to be capable of being exercised, and whether there is any legal hindrance to its continuance during that period, often need consideration. Definite purpose and explicit language concerning these points are needed in framing powers. The context, however, often sufficiently shows the meaning of indefinite words. Generally, a power given to a specified person may be exercised at any time during his life (Sug. *Pow.*, 8th ed., 261; Lord Campbell, C., 1860, 2 De G., F. & J. 461). One given to a trustee or executor, as such, may be exercised by him so long as and no longer than he holds the office. The circumstance that a power given to a woman expressly authorises her to exercise it, notwithstanding coverture, does not always imply that she may not exercise it while sole (*Doe v. Bird*, 1833, 2 Nev. & M. 679). A power to appoint among their children given to the survivor of a husband and wife has been held not to authorise a joint appointment (*MacAdam v. Logan*, 1791, 3 Bro. C. C. 310), or one by the eventual survivor during the life of the other (*Doe v. Tomkinson*, 1813, 2 M. & S. 165; Sug. *Pow.*, 8th ed., 124, 265; Chance, *Pow.* 412; *Hole v. Escott*, 1838, 4 Myl. & Cr. 187); but where the power given to the survivor of several is a general one, it may, during the lives of all or some, be exercised by the one who eventually survives (Lord Westbury, C., in *Thomas v. Jones*, 1862, 1 De G., J. & S. 63, 79).

Where powers, such as powers of jointuring and charging portions, are intended to authorise such charges only in the event of the donees or their issue becoming entitled in possession to the land to be charged, it is usual to expressly enable the donee to exercise them, while it is still uncertain whether he or his issue will become so entitled, leaving the efficacy only of the appointment contingent on the still uncertain event.

Powers of sale, leasing, and the like conferred upon the trustees of a settlement, without any definition of the period during which they may be exercised, are held to be capable of being exercised while estates for life or in tail under the settlement subsist (*Lantsbery v. Collier*, 1856, 2 Kay & J. 709), or possibly for twenty-one years after the determination of the last life estate (Sug. *Pow.*, 8th ed., 849).

An unlimited power of sale for the purposes of division of the proceeds among a class may be exercised within a reasonable time after the death of a person living at its creation (*In re Lord Sudeley and Baines & Co.*, [1894] 1 Ch. 334; [1897] App. Cas. 11).

The doctrines above stated prevent the powers to which they are applicable from being obnoxious to the rule against perpetuities (see PERPETUITY and REMOTENESS).

*How Powers should be exercised.*—The exercise of a power must aim only at the end for which the power was designed (*Aleyn v. Belchier*, 1758, 1 Eden, 132), and the formalities required by the donor must be observed.



An appointment needs consideration with reference to both its substance and its form.

*Execution of, Fraudulent.*—It is, however, almost if not quite exclusively in the case of limited powers that it is necessary to see that they are exercised for the end designed. The ordinary powers of appointing among the members of a class of issue must be exercised by the donee with a single view to the object of the power (*Duke of Portland v. Topham*, 1864, 11 H. L. 32, 55), and not in order to accomplish any by-object (*ibid.*), or to obtain a benefit for either the appointor (*Lord Hinchinbroke v. Seymour*, 1784, 1 Bro. C. C. 395; see *Henty v. Wrey*, 1882, 21 Ch. D. 332) or any person who is not an object of the power (*In re Marsden's Trust*, 1859, 4 Drew. 594).

The expressions "fraud on the power" and "fraudulent appointment," which are most frequently used to designate these improper exercises of powers or to describe their character, are often inexact, as they suggest an immorality in the appointor with which he may not be chargeable. In what is commonly treated as the leading case (*Aleyn v. Belchier, ubi supra*, 1 White and Tudor, *L. C. in Eq.*) a corrupt intention by the donee of the power did exist. He sought by the exercise of a power to charge with a jointure for his wife to create one for his own benefit. The burden of proving fraud lies on him who charges it. See FAMILY ARRANGEMENT; PURCHASER FOR VALUE.

If an appointment be made in pursuance of an agreement with the appointee for his giving a benefit to the appointor or anyone not an object of the power (*Daubeny v. Cockburn*, 1816, 1 Mer. 626; 15 R. R. 174; *In re Kirwan's Trusts*, 1883, 25 Ch. D. 373), the appointment is void. The common appointment by a parent to a child in expectation of marriage and of a settlement to be made on the marriage is permitted (*Sug. Pow.*, 8th ed., 670–673); as are appointments good in part though bad in part (Clarke, M. R., in *Alexander v. Alexander*, 1755, 2 Ves. 640, 644), if the good part is distinguishable and separable from the bad, and was intended by the appointor independently of the part to which effect cannot be allowed.

The form of an appointment is also important. A power to appoint by deed cannot be exercised by will (*Sug. Pow.*, 8th ed., 209); nor can one to appoint by will be exercised by an act to take effect in the life of the donee (*ibid.* 210; *Thacker v. Key*, 1869, L. R. 8 Eq. 408). If, as was formerly customary, attestation by two or more witnesses is required by the power, the requisition must be complied with. Indeed, a direction that the appointment should be under the hand and seal of the appointor, attested by witnesses, required the attestation clause to express that the deed was both signed and sealed in their presence (*Wright v. Wakeford*, 1811, 17 Ves. 454; 15 R. R. 363 *n.*); but except in the case of deeds executed after the 29th July 1814 and before the 13th August 1859, that law is abrogated (54 Geo. III. c. 168; 22 & 23 Vict. c. 35, s. 12). If a power capable of exercise by will after 1837 be so exercised, the will must be executed, as the Wills Act of that year requires wills to be executed, and if so executed need not be executed with any other solemnity, though it may be required by the power (s. 9). A power which may be exercised by writing may be exercised by will, but if the will be made after 1837 it must be executed as the Act requires (*Taylor v. Meads*, 1865, 4 De G., J. & S. 597).

A general devise or bequest in a will made after 1837 passes real or personal estate which the testator has power to appoint in any manner he



may think proper, unless a contrary intention appears by the will (Wills Act, 1837, s. 27).

*Exercises Defective in Form: where remedied.*—In some cases in which the donee of a power has purported to exercise it, but has neglected to comply with a direction by the donor of the power concerning the form of its exercise, the Court, in the exercise of its equitable jurisdiction, has deemed itself entitled to supply the defect, if the intention of the appointor appear, if the act he intended to do be authorised by the power, if the defect be formal only, and if the object of the intended appointment be a purchaser for valuable consideration, a person for whom the appointor is under a natural or moral obligation to provide, a creditor of the appointor, or a charity (Sug. *Pow.*, 8th ed., 549–568; Farwell, *Pow.*, 2nd ed., 327–361). The principle upon which the Court in these cases acts, Lord Alvanley, M. R., stated thus: Whenever a man having power over an estate, whether ownership or not, in discharge of moral or natural obligations, shows an intention to execute a power, the Court will operate on the conscience of the heir to make him perfect this intention (1791, 3 Bro. C. C. 230). Sir William Grant, M. R., challenged the validity of the principle, pointing out that the person affected by the decree, the owner of the property in default of appointment, is a stranger to the equity between the appointor and the person in whose favour he intended to exercise the power (1802, 7 Ves. 506). The doctrine, however, is established, though reliance on its application in a particular case cannot be felt without much circumspection and examination of the decided cases. So also some contracts by donees to exercise powers have been enforced against remaindermen (*Dowell v. Dew*, 1843, 7 Jur. 117; *Davis v. Harford*, 1882, 22 Ch. D. 128).

The Legislature has provided remedies for some particular defects, such as some in forms of attestation (Preston's Act, 54 Geo. III. c. 168; 22 & 23 Vict. c. 35, s. 12), some in the number of witnesses to wills (Wills Act, 1837, 1 Vict. c. 26, s. 10), some in deviating in leases from the terms required by the powers under which they purport to be made (12 & 13 Vict. c. 26; 13 & 14 Vict. c. 17), and some in sales under powers in which the tenants for life have taken timber money (22 & 23 Vict. c. 35, s. 13).

The equitable jurisdiction to supply defects in the exercise of powers cannot be employed in the case of an exercise of a statutory power (Sug. *Pow.*, 8th ed., 564; Farwell, *Pow.*, 2nd ed., 343, 344); but contracts by a tenant for life or by a person having the powers of a tenant for life under the Settled Land Acts, 1882 to 1890, to exercise any of those powers, will bind the remaindermen (S. L. A. 1882, s. 31; S. L. A. 1890, s. 6).

*Consent.*—The lack in the exercise of a power of a consent, which the donor in creating the power required, is not a mere formality which ordinarily the Court can supply (see Farwell, 2nd ed., 131, 138, 140–142).

*Exclusive and Illusory Appointments and Hotchpot Clauses.*—Those dispositive powers which enable the donees to distribute a fund among members of a class may be either exclusive or non-exclusive, that is to say, they may either enable the donees to give the whole fund to some one or more only of the members of the class, excluding the other members or member, and this is what such powers most frequently are intended to authorise, or they may require every member to be benefited, the donees being empowered to determine only the amount and often other conditions of the shares in which they shall take respectively. Obviously, the non-



exclusive purpose of the maker of a power might be frustrated by the donee's giving a share of unsubstantial value to an object he wished not to benefit. The device succeeded at law (1 T. R. 438 *n.*), but the Court of Chancery defeated it (*Gibson v. Kinven*, 1682, 1 Vern. 66), holding the appointment to be illusory. Lord Alvanley, M. R., lamented the introduction of the doctrine and, stating the authorities for it, showed the difficulty of discriminating between substantial and illusory appointments (*Kemp v. Kemp*, 1801, 5 Ves. 849, 858; 5 R. R. 182; *Sug. Pow.*, 8th ed., 938). The inconvenience of the equitable doctrine induced the Legislature in 1830, and at the instance of Lord St. Leonards, then Sir E. B. Sugden, to support the rule of law (11 Geo. iv. and 1 Will. iv. c. 46). Forty-four years later the Earl of Selborne sought a new remedy in an Act "that no appointment . . . made in exercise of any power to appoint any property . . . amongst several objects" should "be invalid . . . on the ground that any object of such power" had "been altogether excluded" (37 & 38 Vict. c. 37, s. 1). Donors may still declare the amounts from which no object shall be or some or one shall not be excluded (*ibid.* s. 2). Powers of appointment of the kind under consideration are usually followed by what is called a Hotchpot Clause, being one precluding an appointee from participating under the usual trust in default of appointment in an unappointed part of the fund, without accounting for the part appointed to him under the power as part of what he is entitled to under the trust. See also ILLUSORY APPOINTMENTS.

*Estates appointed either Remainders or Executory Uses.*—The future estates which powers authorise the donees to create in land must be either contingent remainders or executory springing or shifting uses or trusts. If land be settled to the use of A. for life, and after the determination of that estate to the use of such children or child of A. as he shall appoint, and A. appoint an immediately expectant estate to a child, that limitation creates a remainder (*Whitby v. Mitchell*, 1889-90, 42 Ch. D. 494; 44 *ibid.* 85). See CONTINGENT REMAINDERS; EXECUTORY INTERESTS. The distinction is not important, or indeed possible, with reference to appointments of personalty, because in property of that kind no remainders or other estates were recognised by the Courts of law as distinguished from those of equity.

*Powers to appoint new Trustees.*—The greater number of settlements need for their efficiency trustees, and consequently it is necessary to provide means whereby, on the failure, inability, or unfitness of those first appointed to perform their functions, others may be substituted. For that purpose a power to appoint from time to time new trustees was invented, and until 1860 it constituted a usual provision in instruments creating trusts. Since that year powers constituted by Act of Parliament have existed, and in a settlement it is now unnecessary to insert more than a few words adapting the statutory power to the needs of the particular case. (For an account of these powers, see TRUSTS.)

[*Authorities.*—*Sug. Pow.*, 8th ed.; *Chance, Pow.*; *Farwell, Pow.*, 2nd ed.; *Vaizey, Settlements*, pp. 341-401.]

**Powers given to Trustees generally.**—See TRUSTS.

**Powers in Real Property Settlements.**—See SETTLED LAND ACTS.



**Powers in Settlements of Personality.**

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Settlements of personal estate include, according to the understanding of conveyancers, settlements of land as personal estate by way of trust for sale and declaration of trust of the proceeds; and settlements of this description contain usually powers of management until sale, and of exchange and of leasing, and other powers appropriate to the nature of the property in its actual condition when settled. It is considered that these powers are sufficiently dealt with in the articles SETTLEMENTS and SETTLED LAND ACTS. And as regards the general powers of trustees, including those of investment, and the power of appointing new trustees, these are dealt with in the article TRUSTS. The present article is confined therefore to such other powers as are commonly or frequently introduced into settlements of personal estate (whether on marriage or otherwise *inter vivos*); and the powers so treated of are distributed (as nearly as may be in the order in which they occur in a settlement) under the following heads, viz.:—I. Powers of Appointment amongst Issue; II. Powers of Advancement; III. Powers of Maintenance and Education; IV. Powers of appointing Life Interests; V. Powers of making future Settlements; VI. Powers of Revocation; VII. Other Powers. It should be observed that in a settlement of personal estate all these are equitable, and not legal, powers, it being the invariable practice, and, as a general rule, absolutely necessary, to vest the settled fund in trustees, whose legal interest cannot be divested by the execution of any power, but whom equity will compel to deal with the fund according to the trusts. (See Sugden, *Powers*, 8th ed., ch. ii. pp. 45, 46.)

I. POWERS OF APPOINTMENT AMONGST ISSUE.—In a marriage settlement of the normal description, powers for this purpose are given by means of a declaration that, after the death of the husband and wife, the capital and income of the settled fund shall be held in trust for the issue of the marriage as the husband and wife shall jointly by deed appoint, and in default as the survivor shall by deed or will appoint; and the powers are followed by a trust, in default of appointment, for the children of the marriage, who, being sons, attain the age of twenty-one, or, being daughters, attain that age or marry, in equal shares, with the addition of a clause (called the HOTCHPOT clause), which provides that no child who or whose issue shall take any share by appointment, shall in default of appointment to the contrary be entitled to any share in the unappointed part without bringing the appointed share into account. The trust for children and the hotchpot clause are thus closely associated with the powers of appointment, of which, however, they form no part. Sometimes there is substituted for the sole power to the survivor a sole power to the party by whom the fund has been settled if surviving the other; sometimes the joint power is altogether omitted, and each party has a sole power over his or her own fund; and in a voluntary settlement, where there is only one life interest, this is the common practice, the sole power being given to the life tenant in favour of his or her issue generally. The word *issue* in a power of this description means issue of every degree (*In re Warren's Trusts*, 1884, 26 Ch. D. 208),



and the power is made exercisable in favour of issue instead of children (as was at one time usual), because provision can thus be made under the power for the family of a deceased, or improvident or incapable child. It is intended always that this power shall be exercisable in favour of any one or more of the objects exclusively of the others; and in order to enable that to be done, it was necessary formerly to use express words to that effect; but the law in this respect has been altered by the Powers of Appointment Act, 1874 (37 & 38 Vict. c. 37) (see *In re Deakin*, [1894] 3 Ch. 565). The class of issue is very often confined in express terms to issue born (which includes those *en ventre sa mère*, *Blasson v. Blasson*, 1864, 2 De G., J. & S. 665; *In re Burrows*, [1895] 2 Ch. 497) during the life or lives of some named person or persons (usually in a marriage settlement the husband and wife), or the life of the survivor of such persons if more than one, or within twenty-one years after the expiration of such life or lives; and it is sometimes expressly provided that every or any appointee shall take a vested interest within the same period (see PERPETUITY). But for neither purpose is an express provision necessary; the rule being that under a power to a person *in esse* to appoint to issue generally, the donee may appoint to such as are born, and for interests which must vest, within the line of perpetuity (Sugden on *Powers*, p. 152; *Slark v. Dakyns*, 1874, L. R. 10 Ch. 35; *In re Hargreaves*, 1890, 43 Ch. D. 401). The perpetuity limit, allowed by law, is (it may be here observed) a life or lives in being, and twenty-one years afterwards, with the addition of the period of gestation, if gestation exists. In the application of this rule to powers of appointment of the description now under consideration, the words *in being* are to be referred to the date of the instrument creating the power (Sugden on *Powers*, p. 396, where it is pointed out that the test of the validity of estates created under a power is to place (or read) them into the instrument creating the power; and see *In re Brown & Sibly's Contract*, 1876, 3 Ch. D. 156); and it would seem (though it is nowhere expressly so laid down) that the life or lives with reference to the existence of which the appointment must be made, if none are expressly mentioned, will be the life or lives of the donee or donees, and the lives of others in existence who are interested in the fund, and mentioned or referred to in the settlement, including the objects, if any are in existence, which in the case of a marriage settlement could not be. Under a power of this description, the donee can create such interests, not obnoxious to the perpetuity rule, as he thinks fit. Thus he may appoint in shares, or for life with a power of appointment by deed or will (*Phipson v. Turner*, 1838, 9 Sim. 227; *Morse v. Martin*, 1855, 34 Beav. 500; *Slark v. Dakyns*, *ubi supra*; *In re Meredith's Trusts*, 1876, 3 Ch. D. 757; though not, probably, as to a married woman unborn at the date of the settlement, with a restraint on anticipation, as to which, see *Whitby v. Mitchell*, 1890, 42 Ch. D. 494; 44 Ch. D. 85; and *Herbert v. Webster*, 1880, 15 Ch. D. 610, and cases there cited), or by way of annuity, or to trustees for sale and division among the objects (Sugden on *Powers*, p. 406), or to trustees for the benefit of the objects (as to which, see *In re Tyssen*, [1894] 1 Ch. 56; and *In re Paget*, [1898] 1 Ch. 290, where some pertinent observations on the subject will be found, though the actual decision is immaterial, and also open to remark, as pointed out in *L. Q. R.* xiv. 123), or even to a person not an object with the approbation of the object (*In re Turner's S. E.*, 1883, 28 Ch. D. 205, 216), the transaction being treated as an appointment to the object, and also as a gift by him to the person benefited (per Wigram, V.C., 1842, 2 Hare, 196), which of course would be good, unless procured in fraud of the power within the equitable doctrine



on that subject to be presently mentioned. But he cannot without special authority delegate the power (Sugden on *Powers*, p. 129, c. vi. s. 1; and cp. *Burnaby v. Baillie*, 1889, 42 Ch. D. 282), and for this reason he is often expressly empowered to provide for the maintenance and education or advancement of the objects at the discretion of the trustees or others, and as regards advancement, either overreaching the prior interests or not (see II.). It is not usual now to require that the deed of appointment shall be executed in any particular manner, and, whatever may be the formalities required by the power, a deed attested by two witnesses will suffice. See the Law of Property Amendment Act, 1859 (22 & 23 Vict. c. 35), s. 12. Upon any appointment a power of revocation may be reserved, although the power of appointment does not in terms authorise such a revocation (Sugden on *Powers*, p. 367; *In re Harding*, [1894] 3 Ch. 315); but an appointment not reserving a power of revocation is irrevocable. See Sugden on *Powers*, p. 200, pl. 18; and as to the mode of operation of revocations and new appointments generally, c. vii. s. 9; *Wilson v. Kenrick*, 1885, 31 Ch. D. 658. It seems to be clear that a power of appointment of the description now under consideration, given to the survivor of several persons, cannot be exercised during the joint lives, even though the party appointing should in event be the survivor (*Thomas v. Jones*, 1863, 1 De G., J. & S. 63, 78; and see also *In re Blackburn*, 1889, 43 Ch. D. 75). Upon the form and scope generally of powers of the description now under consideration, enough has been said; but there are some incidental points which should be mentioned. The donee of such a power (like the donee of any other special power) must execute it *bonâ fide* for the end designed; otherwise the appointment will be regarded as a fraud upon the power, and void in equity (*Aleyn v. Belchier*, 1 Col. 132; 1 White and Tudor, L. C.). Thus an appointment by a father to an infant child in a consumption with the purpose of taking the fund as her administrator, is a fraud upon the power (*Lord Hinchinbroke v. Seymour*, 1784, 1 Bro. C. C. 395; explained, *Henty v. Wrey*, 1882, 21 Ch. D. 332); so is an appointment upon a bargain with the appointee for a purpose not authorised by the power, or followed by communication to the appointee of the unauthorised purpose (*Topham v. Duke of Portland*, 1864, 11 H. & C. 32; *Topham v. Duke of Portland*, 1869, L. R. 5 Ch. 40; *In re Deane*, 1889, 42 Ch. D. 9); or upon an unauthorised condition which cannot be severed from the appointment, though there was no bargain (*Roach v. Trood*, 1874, 3 Ch. D. 429; *In re Kirwan's Trusts*, 1883, 25 Ch. D. 373; *In re Perkins*, [1893] 1 Ch. 283). But this doctrine does not extend to a release of the power (*In re Somes*, [1896] 1 Ch. 250); and it has been long settled that such a power (not being a power simply collateral) may be released. See Sugden on *Powers*, pp. 82 *et seq.*, 90; and as to the classification of powers not arising under the Statute of Uses, by analogy (as it is presumed) to powers so arising, *In re D'Angibau*, 1880, 15 Ch. D. 228, a case upon the execution of a power by an infant; but it must be borne in mind that since the Conveyancing Act, 1881 (s. 52), even a power simply collateral, if not coupled with a duty (*In re Eyre*, W. N. 1883; 49 L. T. 259), may be released. Whether a married woman can release a power has been regarded as doubtful (Sugden on *Powers*, p. 92); but her capacity to do so seems to have been admitted in *Burnaby v. Baillie*, *ubi supra*, and *In re Little*, 1889, 40 Ch. D. 418, *sub silentio*, and *In re Davenport*, [1895] 1 Ch. 351. Finally, it should be observed that the power is one defective execution of which in favour of children will be aided in equity (Sugden on *Powers*, pp. 534, 536). The trust for children in default of appointment and the hotchpot clause are



outside the scope of this article, but the latter (it may be added) is inserted to prevent the application of the doctrine that an object of a power to whom a share is appointed is not excluded from taking another share of the unappointed funds (Sugden on *Powers*, p. 640; and see as to hotchpot, where one fund is settled by reference to another, *In re Marquis of Bristol*, [1897] 1 Ch. 946).

II. POWERS OF ADVANCEMENT.—A power of this description usually enables the trustee after the death of the prior life tenants or life tenant, or previously with their, his, or her consent, to raise any part not exceeding (as a rule) one-half of the expectant presumptive or vested share of any child under the trusts, and to apply the same for the advancement or benefit of such child. It is sometimes contended that the word *benefit* in such a power only extends to matters *ejusdem generis* with advancement; but the contention is probably wrong (see *Lowther v. Bentinck*, 1874, L. R. 19 Eq. 166; *In re Breeds' Will*, 1875, 1 Ch. D. 226; *In re Gore's Settlement Trusts*, W. N. 1879, p. 79; and (as being *in pari materia*) *Taylor v. Taylor*, 1875, L. R. 20 Eq. 155; *In re Blockley*, 1885, 29 Ch. D. 250; *In re Price*, 1887, 34 Ch. D. 603). However, it may be as well in appropriate cases to mention expressly, amongst the purposes for which money may be raised, such purposes as university professional or technical education (*Roper Curzon v. Roper Curzon*, 1871, L. R. 11 Eq. 452), and the provision of a portion or outfit for a daughter on marriage. The power as above described applies only to a child's share under the trusts; and it is apprehended that this is right, for an appointment takes the appointed share wholly out of the settlement (Sugden on *Powers*, p. 467); and the proper course is to enable the donee or donees of the power of appointment to provide for the advancement of appointees, for which purpose such donee or donees must be authorised, as before explained, to delegate the power, and also to overreach the prior interests (see, however, *White v. Grane*, 1854, 18 Beav. 571). It should be noted that alienation by a tenant for life whose consent is required, does not extinguish his right to consent; but such consent may still be given, with the concurrence or sanction of the alienee (*In re Cooper*, 1884, 27 Ch. D. 565; *In re Beddingfield and Herring's Contract*, [1893] 2 Ch. 332).

III. POWERS OF MAINTENANCE AND EDUCATION.—It was the practice formerly to direct that the trustees should, after the death of the life tenant or life tenants, apply all or such part as they might think fit of the income of the expectant share of any child under the trusts (which, as observed in II., is thought to exclude an appointed share) for or toward the maintenance or education of the child, and should accumulate the residue (if any) for the benefit of the person becoming entitled to the principal, but with power to resort to accumulations, and apply them as if they were income. The clause, it will be observed, took the form of a trust, rather than of a power. Sec. 26 of Lord Cranworth's Act (23 & 24 Vict. c. 145) was intended to render the clause unnecessary (*In re Cotton*, 1875, 1 Ch. D. 232); but the practice of inserting such a clause continued notwithstanding. Now it has been altogether superseded by sec. 43 of the Conveyancing Act, 1881, which effectually supplies its place where the trust in default of appointment is in the form indicated in No. I. (*In re Holford*, [1894] 3 Ch. 30; see also *In re Moody*, [1895] 1 Ch. 101; *In re Woodin*, [1895] 2 Ch. 309; *In re Jeffrey*, [1895] 2 Ch. 577). Where, however, the trust is so expressed as to give the infant a vested but defeasible interest (*In re Buckley's Trusts*, 1883, 22 Ch. D. 583), and also in the case of an infant life tenant (*In re Wells*, 1889, 43 Ch. D. 281; *In re Humphreys*, [1893] 3 Ch. 1), the destination of accumulations should be expressly provided for. And it



must be noticed that the statutory power is not exercisable after minority (*In re Breeds' Will, ubi supra*); nor does it apply where the interest is less than a life interest. It may be added that the institution of an action for the administration of the trusts, though it paralyses the powers of the trustees, and disables them from exercising such powers otherwise than under the direction of the Court, does not take away their discretion, or justify the Court in interfering with such discretion (*In re Bryant*, [1894] 1 Ch. 324).

IV. POWERS OF APPOINTING LIFE INTERESTS.—It is seldom that a simple power of this description is introduced into a marriage settlement. But in a voluntary settlement for the benefit of an individual and his or her family, where no life interest is given to the wife or husband of the principal beneficiary, such principal beneficiary is commonly authorised by deed (executed in contemplation of marriage or otherwise) or will to appoint that after his or her death, all or any part of the income of the settled fund shall be paid to his or her surviving wife or husband, for the life of such wife or husband, or for any less period, and with or without restriction. In settlements of this kind it is, generally speaking, more prudent to introduce such a power in lieu of giving a life interest to the wife or husband; and if the principal beneficiary be unmarried at the date of the settlement, a life interest to the wife or husband should never be given, both because the character of such wife or husband must necessarily be unknown, and because she or he may be a person unborn at the date of the settlement, and risks of infringing the perpetuity rules will be incurred (see *In re Harvey*, 1888, 39 Ch. D. 289; *In re Frost*, 1889, 43 Ch. D. 246; and also *In re Abbott*, [1893] 1 Ch. 54).

V. POWERS OF MAKING FUTURE SETTLEMENTS.—Upon the marriage of a young woman possessed of any considerable property, where the whole of her property is settled, it is matter of course to introduce into the settlement a power for her to make a settlement on a future marriage (see *Rudge v. Winnall*, 1848, 11 Beav. 607). This power is usually made exercisable only in the event of her surviving her intended husband. It enables her to appoint a specified aliquot part of the settled fund, or a part varying with the number of the children of the intended marriage, in favour of a future husband, and the issue of a future marriage.

VI. POWERS OF REVOCATION.—A general power to revoke the trusts is seldom introduced into a marriage settlement. In a voluntary settlement such a power is not unusual; and there are cases in which the absence of such a power has led to the settlement being set aside or treated as revocable, but of course the settlement is not invalidated by the mere fact of such a power not being found (*James v. Couchman*, 1885, 29 Ch. D. 213). The power is generally made exercisable by deed, and often with the consent of the trustees, and so that their discretion as to giving or withholding consent shall be absolute and uncontrollable. It should enable the donee not only to revoke or vary the trusts, but also to declare (by way of new appointment) other trusts for the benefit of himself, his executors or administrators, or otherwise (*Eland v. Baker*, 1861, 29 Beav. 137). A mere revocation without more would cause a resulting trust for the settlor or his representatives.

VII. OTHER POWERS.—Only the most important of these can be mentioned, viz.: (1) Power for a wife to dispose of the fund settled by her or on her behalf in default of issue. This is a usual power in a marriage settlement, and also *mutatis mutandis* in other settlements upon a woman and her issue. It takes the form generally of a declaration that, if there shall be no child who attains a vested interest under the preceding trusts, then,



subject to those trusts, the capital and income of the fund, or so much of both as shall not have become vested or been applied under any of the trusts and powers contained or by statute implied in the deed, shall be held in trust for such person or persons and purposes as the wife shall, when discover, by deed, or, whether covert or discover, by will, appoint. In default of appointment, the trusts are, if the wife survives the husband, for her absolutely, but as her separate property without power of anticipation during the intended coverture, and if the husband survives the wife, then for a class of persons commonly described as her statutory next-of-kin, excluding her husband. The present article is not concerned with these trusts, but it will be observed that there are really two powers, one exercisable by deed, and the other by will, and that the absolute trust for the wife, if she survives her husband, seems to render both useless or superfluous in that event. In fact, the first contemplates the possibility of a divorce, and is intended to enable the wife to dispose of the fund after divorce, and the powers and trusts combined are intended to preserve to the wife complete dominion over the fund independently of her husband, but subject, of course, as above appears, to the prior interests. (2) Power to lend all or part of the funds to the husband or some other interested person with or without security. In this case the trustees must be protected from liability for not calling in the money. (3) Power for the trustees to keep up life policies comprised in the settlement out of the other settled funds. In this case the trustees must be protected from liability for not exercising the power, or for the policies becoming void by any means whatever. (4) Power to invest in the purchase of land or a house. Such an investment is outside the usual scope of an investment clause, and the purchased property should be subjected to a trust for sale, trusts of the net moneys produced by the sale being declared by reference to the trusts of the settled fund, though it would appear that a mere referential trust of the land itself would have much the same effect (*Tait v. Lathbury*, 1865, L. R. 1 Eq. 174; *In re Garnett Orme and Hargreave's Contract*, 1883, 25 Ch. D. 595). The power is usually made exercisable only during the lives of the life tenants, or the life of the survivor of them, with their, his, or her consent in writing. (5) Power to withdraw absolutely part of the settled funds. This may be given either in the form of a power of appointment in favour of the donee, his executors, administrators, or assignees, or in the form of a general power of revocation and new appointment extending only to the part permitted to be withdrawn.

Upon the law of powers generally, see POWERS. Sugden is still the standard authority; but Chance on *Powers*, though seldom referred to, is a learned, accurate, and comprehensive work. Mr. Farwell's excellent book on *Powers* has reached a second edition; and Vaizey on *Settlements* deals fully with the subject of this article.

**Powers to appoint New Trustees.**—See POWERS; TRUSTS.

**Poyning's Act.**—See IRELAND, vol. vii. at pp. 61, 63.

**Practicable.**—Under some statutes a person may, although he does a prohibited act, be protected if he has complied with the enactment



“as far as practicable.” Now it is always possible to do nothing, so that in general all rules are practicable; wherefore, when such words occur, they must be treated as qualifying the prohibition to some extent. Thus in the Public Health Act, 1875, 38 & 39 Vict. c. 55, s. 91, factories, workshops, and workplaces are directed to be kept in a cleanly state and ventilated, so as to render innocuous, *as far as practicable*, all gases, vapours, etc.; and under the same section a fireplace or furnace which does not, *as far as practicable*, consume its smoke is liable to be dealt with summarily as a nuisance. In that section evidently the intention is not to prohibit gas, vapour, or smoke entirely, but to keep it within certain limits. So in the Coal Mines Regulation Act, 1872, 35 & 36 Vict. c. 76, s. 51, it is enacted that certain regulations are to be carried out as far as is reasonably practicable; and under that section it was held that the words referred to physical or engineering difficulties in the way of carrying out the rules, and not to the carrying on of the mine as a profitable concern (*Wales v. Thomas*, 1885, 16 Q. B. D. 340). If the direction is to carry out a set of affirmative and negative rules, however, so far as is reasonably practicable, the qualification would not appear to apply to the negative rules (*Wales v. Thomas, supra*). For another instance of the use of the word, reference may be made to the Animals Order, 1871, issued by the Privy Council under the Contagious Diseases (Animals) Act, 1869, 32 & 33 Vict. c. 70, s. 75, which directs notice to be given “with all practicable speed.” These words were held to imply that no offence was committed until the person was aware of the animal being diseased. Frequently the phrase “as far as practicable” will be synonymous with “as far as possible” (cp. *Cooper v. Woolley*, 1867, L. R. 2 Ex. 88).

**Practice.**—According to Lord Westbury in *A.-G. v. Sillem*, 1864, 10 H. L. 704, the word “practice” in its common and ordinary sense denotes the rules that make or guide the *cursus curiæ*, and regulate the proceedings in a cause within the walls or limits of the Court itself. So it does not imply or involve anything relating to the extent or nature of its jurisdiction. In the Queen’s Remembrancer’s Act, 1859, 22 & 23 Vict. c. 21, s. 26 (now repealed), the word is found closely associated with the terms, process, and mode of pleading, but the pleadings in an action are not strictly practice, though a not unimportant part of the proceedings. The rules of Court, however, as to the form and time for lodging pleadings, etc., properly come within the term. Even proceedings on execution, though coming after judgment, and when a case has left the hands of the Court, are treated of in modern books of practice. And though the right to appeal to a superior Court is not practice of the inferior Court, yet the rules regulating appeals may in part relate thereto. To sum up, the term will properly include the form and manner of instituting and conducting civil actions and criminal prosecutions through their various stages, from the commencement to final judgment and execution, according to the rules and regulations laid down by or under the statutes governing judicial proceedings.

Under the Law Terms Act, 1830, 11 Geo. iv. & 1 Will. iv. c. 70, s. 1 (repealed by the Civil Procedure Acts Repeal Act, 1879, 42 & 43 Vict. c. 59), a common law judge was appointed, who held a special court for practice matters, such as motions for new trials, or for writs of mandamus and prohibition. At the present day, however, such matters may be brought before any Court.



**Præcipe.**—A præcipe is a slip of paper which must be filed in the Writ Department of the Central Office upon issuing a writ of execution. It must contain the title of the action, the reference to the record, the date of the judgment, and of the order, if any, directing the execution to be issued, and the names of the parties against whom, or of the firm against whose goods, the execution is to be issued; and must be signed by or on behalf of the solicitor of the party issuing it, or by the party issuing it, if he does so in person (R. S. C. Order 42, r. 12).

“Præcipe” was formerly the name for “an original writ in the alternative, commanding the defendant to do the thing required, or show the reason for not doing it, and drawn up in the form of a præcipe (or command) to do the thing, or show cause to the contrary; giving the defendant his choice, to redress the injury or stand the suit” (3 Black. *Com.* 274); and a *præcipe in capite* was a writ of right (an original writ) for an immediate tenant of the king (*ibid.* 195). A person in possession of an estate of freehold, who suffered a recovery (a collusive action) to be brought against him, in order to bar an estate tail together with the remainders and reversion, was called the “tenant to the præcipe.” Recoveries were abolished by the 3 & 4 Will. IV. c. 74, and original writs are now also abolished.

**Prædial Tithes.**—See TITHES.

**Præmunire; Premunire,** corrupted from, or apparently synonymous with, *præmoneri*, “to be forewarned.” It is an offence so called from the words of the writ preparatory to the prosecution thereof: “*præmunire facias* A. B. (cause A. B. to be forewarned) that he appear before us to answer the contempt wherewith he stands charged.” It took its origin from the exorbitant power claimed and exercised in England by the POPE, and was originally ranked as an offence against the king, because it consisted in introducing a foreign power into this land.

The Church of Rome took on herself to bestow most of the ecclesiastical livings of any worth in the Church of England by mandates before they were void, pretending therein great care to see the Church provided of a successor before it needed. These provisions were so common, that at last it was necessary to restrain them by the laws of the land.

In the thirty-fifth year of the reign of Edward I. was made the first statute against papal provisions (35 Edw. I. st. 1). It was, according to Coke, the foundation of all the subsequent statutes of *præmunire*.

The 16 Rich. II. c. 5 is the statute generally referred to by all subsequent statutes, and is usually called the *Statute of Præmunire*. It enacts that whoever procures at Rome, or elsewhere, any translations, processes, excommunications, bulls, instruments, or other things which touch the king, against him, his crown and realm, and all persons aiding and assisting therein, shall be put out of the king’s protection, their lands and goods forfeited to the king’s uses; and they shall be attached by their bodies to answer to the king and his council; or process of *præmunire facias* shall be made out against them as in other cases of provisors. By 2 Hen. IV. c. 3, all persons who accept any provision from the pope to be exempt from canonical obedience to their proper ordinary, were also subjected to the penalties of *præmunire*. This is said to be the last ancient statute concerning this offence till the Reformation.



Whenever it is said that a person by any act incurs a *præmunire*, it is meant to express that he thereby incurs the penalties which, by the various statutes that have been passed relating to that offence, are inflicted for the offences therein described.

At the time of the Reformation, the penalties of *præmunire* were extended to more papal abuses than before. And therefore by the Statutes 24 Hen. VIII. c. 12; 25 Hen. VIII. c. 19, 21, to appeal to Rome from any of the king's Courts, which (though illegal before) had at times been acquiesced in; to sue to Rome for any licence or dispensation, or to obey any process from thence, became subject to the pains of *præmunire*. By 25 Hen. VIII. c. 20, it is enacted that if the dean and chapter refuse to elect to a vacant bishopric the person named by the king, or any archbishop or bishop to confirm or consecrate him, they shall fall within the penalties of the Statutes of *Præmunire*. As to this see *R. v. Archbishop of Canterbury*, 1848, 11 Q. B. 483.

The penalties of *præmunire* were subsequently applied to other heinous offences in no way connected with papal aggression, *e.g.* to assert maliciously and advisedly, by speaking or writing, that both Houses or either House of Parliament have or has a legislative authority without the sovereign, is still a *præmunire* by 13 Car. II. c. 1.

By the Habeas Corpus Act, 31 Car. II. c. 2, it is still a *præmunire*, and incapable of the royal pardon, besides other heavy penalties, to send any subject of this realm a prisoner, under certain exceptions specified in the Act, into parts beyond the seas.

**Prayer-book; Common Prayer-book.**—Gregory the Great directed St. Augustine, the first Archbishop of Canterbury, “to select from each church those things that are pious, religious, and correct,” and when such selection was made, to “instil them into the minds of the English for this use” (Greg. *Opera*, xi. 1151, Bened. ed.; Bede's *Eccl. Hist.* i. 27); and articles 20 and 34 of the Thirty-Nine Articles declare that the Church “hath power to decree rites and ceremonies,” and that “every particular or national Church hath authority to ordain, change, and abolish ceremonies or rites of the Church ordained only by man's authority, so that all things be done for edifying.” Some attempts were made at securing uniformity of service in the Anglo-Saxon period, but not altogether with success. After the Norman Conquest the Sarum Breviary and Missal (on which the present Prayer-book is largely based) was drawn up by St. Osmund, Bishop of Salisbury and Chancellor of England, and adopted for the Cathedral Church of Salisbury in 1085. This compilation, with some variations, became the General Use in the province of Canterbury, with the exception of the dioceses of Lincoln, Hereford, and Bangor. There was also a separate York Use in that province, although in the diocese of Durham the Sarum Use prevailed. There was also, down to 1417, a separate Use for St. Paul's Cathedral. All these services were in Latin, but during the Middle Ages there existed primers for the use of the laity, *e.g.* the *Lay Folks Mass Book*. Generally, it may be stated that until the Reformation the authority of the bishop determined the use of forms of services in all the churches in each diocese. One of the leading, and certainly the most popular feature of the Reformation, was the introduction of the vernacular prayer-book. But although the demand for this reform was frequently made, no alteration of great importance was made in the mass-books, breviaries, and other rituals during the reign of Henry VIII. except the omission of the



collects for the pope and the offices of certain saints; but by a canon of the Convocation of the Province, 1541, a reformed edition of the Sarum Breviary was apparently authorised for the whole province of Canterbury. In 1542 a Committee of Convocation was appointed to reform the existing book of offices, and in 1544 it published the Litany in English.

After the death of Henry VIII. progress became more rapid. In 1548 an order of communion, which is practically identical with part of the present communion service, was interpolated in the Latin Mass (which was not otherwise altered), after the priest's communion. In 1548 the first prayer-book of Edward VI. was completed. This book was mainly composed from the Salisbury Use, but certain portions of it were taken from the Reformed Roman Breviary of Cardinal Quignon, and also from certain Lutheran sources, the Consultation of Archbishop Hermann, and the Nuremberg Mass-Book.

The chief features of the book are, that the services of the canonical hours are replaced by Matins and Evensong, which were constructed by a translation, alteration, and adaptation of the offices of Matins, Lauds, and Prime, Vespers and Compline, which were made congregational. The Litany above referred to, with some alterations, was added to the book. The calendar was reformed, and a table of lessons, including the whole Bible, and omitting other writings, was introduced. The Mass was described as the "Supper of the Lord or the holy communion, commonly called the Mass." This service was in the main taken from the Latin rite, but with considerable alterations, the aim being that the whole of the canon should be said openly. The elevation of the host and other ceremonies were also dropped.

Other offices, *e.g.* for Baptism, Confirmation, Solemnisation of Marriage, etc., were also added, being in the main adapted from the ancient service books. (As to the plan of the work further, see Preface; see also Blunt, *Annotated Book of Common Prayer*. As to vestments and ornaments authorised under it, see articles ORNAMENTS RUBRIC; VESTMENTS.)

(The rubrics of this prayer-book, which are very scanty, apparently presupposed the retention of the ancient gestures and ceremonies, except in so far as they were thereby modified.)

The first Act of Uniformity, 2 & 3 Edw. VI. c. 1 (as to which further, see article, UNIFORMITY, ACTS OF), directed that all ministers in any cathedral or parish church should say and use the services mentioned in this prayer-book "in such order and form as is mentioned in the same book, and none other or otherwise."

An Act passed in the next year, 3 & 4 Edw. VI. c. 10, directed the destruction of the old service books.

In 1550 the new ordinal was introduced (see HOLY ORDERS). A revised edition of the prayer-book was prepared in 1552. This book differed considerably from the former one. Many new prayers were added, and the baptismal service was somewhat altered; but the most important changes were made in the holy communion service, which was no longer called the Mass. The prayers for the souls of the faithful departed were omitted from it, the order of the service was rearranged, and the words of administration were altered. Reservation of the sacrament was forbidden. This book never obtained the approval of Convocation; but it was established by the Act 5 & 6 Edw. VI. c. 1. This Act states that the first prayer-book was "a very godly order for common prayer and the administration of the sacraments, agreeable to the Word of God and the Primitive Church; but (s. 34) because there had risen in the use and exercise of



common service in the Church heretofore set forth, divers doubts for the fashion and manner of the ministration of the same, rather by the curiosity of the ministers and mistakers thereof than of any worthy cause; therefore, as well as for the more plain and manifest explanation thereof, as for the more perfection of the said order," the book had, by the authority of King and Parliament, been "proved, explained, and made fully perfect, and annexed to this statute" (though this, as a matter of fact, was not done), "adding also" the ordinal "to be of like force, authority, and value as the same like aforesaid book, entitled the book of common prayer, was before"; and with the same clauses of provisions and exceptions to all intents and purposes as by the Act 2 & 3 Edw. VI. c. 1 was limited and expressed "for the uniformity of the service and administration of sacraments throughout the realm." The Act provides that the provisions of the former Act are to apply in all respects to the enforcement of the present book.

Several alterations, *e.g.* the Black Rubric, were made to this book without any parliamentary or other legal authority.

After the temporary suppression of the English prayer-book by the Act 1 Mary, c. 2, s. 2, Elizabeth, who succeeded Mary, in 1558 made for a time no serious alterations in divine service (see *Gibbs. Cod.* 1267, 681).

It was finally decided to restore the second prayer-book of Edward VI. with some alterations, most of which were important, and were chiefly made with the view of removing the apparent denial of the Real Presence, which might appear to be contained in that book. The Black Rubric was omitted, the old words of administration at the holy communion were restored and added to the new. A proper table of lessons was also prefixed, and an alteration was made in the Litany (see further, articles ORNAMENTS RUBRIC; VESTMENTS; UNIFORMITY, ACTS OF). This prayer-book was established by the Act of Uniformity, 1 Eliz. c. 2.

Under a power given in this Act (s. 3) (see articles UNIFORMITY, ACTS OF; ORNAMENTS RUBRIC), the Queen in 1561 authorised certain small revisions as to the calendar, etc.; and under the same power James I. in 1604 introduced a few further changes, including the later part of the Catechism, which deals with the sacraments, and an alteration in the rubrics of the baptismal service (see article BAPTISM).

The Puritan Revolution temporarily suppressed the prayer-book. After the Restoration an abortive attempt at a compromise between Churchmen and Presbyterians followed, but no arrangement could be effected between the two parties, and the revision of the prayer-book was intrusted by the Crown to the Convocations of the two provinces. Altogether six hundred alterations are said to have been made in the book at the time of this revision. Several new prayers were introduced, including those for Ember Week, the High Court of Parliament, all conditions of men, and the general thanksgiving. Some new collects and offices were also introduced. In the service of holy communion, the clause respecting saints departed was added to the prayer for the Church militant. The ceremonies of the fraction and oblation of the bread were introduced, and the Black Rubric above mentioned was restored, but with an important difference, that the words "real and essential presence" were altered into "corporal presence." The word "priest" was substituted for pastor or minister in several places, and further rubrics were inserted, and an alteration was also made in the ordinal (see article HOLY ORDERS).

The prayer-book as altered by Convocation received legislative force under the Act of Uniformity, 14 Car. II. c. 4.



This Act provides that the ministers in any cathedral, collegiate, or parish church or chapel or other place of public worship within England and Wales shall be bound to say and use the morning prayer, evening prayer, celebration and administration of both sacraments and all other the common prayer in such order and form as is mentioned in the said book annexed and joined to this present Act. (As to penalties imposed under this Act, see UNIFORMITY, ACTS OF; and as to Wales, see article WALES.)

For the safe keeping and preservation of the book in question, sec. 28 provides that the deans and chapters of every cathedral church within England and Wales shall, before 25th December 1662, obtain under the Great Seal a true and perfect copy of the Act and the book annexed thereto, to be by them and their successors kept and preserved in safety, and to be also produced and showed forth in any Court of record as often as lawfully required; and also that there shall be delivered true and perfect copies of this Act and of the same book into the respective Courts at Westminster, and into the Tower of London, to be kept and preserved for ever among the records to be produced and showed forth in any Court as need shall require. The section provides that such copies so to be exemplified under the Great Seal shall be examined with the original and certified, and thereupon accounted good records. Sec. 21 provides that prayers relating to the Sovereign and Royal Family may be altered as required.

The copies of the original book in the Act mentioned, examined, compared, certified, and exemplified, as mentioned above, became as good records as the book itself, and are generally known as the Sealed Books. The original book and the Sealed Books are part of the statute law, and any addition to the prayer-book not therein mentioned is illegal. The original book, which was lost after 1824, has been recently discovered, and is now placed in the same division of the press as the Act.

(In view of the legislative union of the Churches of England and Ireland, 39 & 40 Geo. III. c. 67, certain changes were directed, by Order in Council, 1st January 1801, to be made in the prayer-book to give effect to this provision. See Stephen's *Book of Common Prayer*, Introduction, p. clxxxviii. Owing to the separation of this union by 32 & 33 Vict. c. 42, it is not necessary to discuss them.)

By the Act of Uniformity Amendment Act, 35 & 36 Vict. c. 35, made in accordance with the report of the Ritual Commission, a shortened form of morning and evening prayer set forth in the schedule to that Act, which schedule is to be taken as part of the Act, is authorised to be used in a cathedral in addition to and in a church in lieu of the order for morning or evening prayer prescribed by the Book of Common Prayer on any day except Sunday, Christmas Day, Ash Wednesday, Good Friday, and Ascension Day (as to the other provisions of the Act, see article UNIFORMITY, ACTS OF).

See also articles RUBRIC; UNIFORMITY, ACTS OF, under which latter the subjects of the use of services other than those provided by the prayer-book and also the depraving of the Book of Common Prayer are treated. (As to Welsh Prayer-book, see article WALES.)

[*Authorities.*—Lindwood, *Prov.*; Gibs. *Cod.*; A. J. Stephen, *Book of Common Prayer*, with Notes; Blunt, *Annotated Book of Common Prayer*; Phillimore, *Eccl. Law*, 2nd ed.]

**Prayers for the Dead.**—A trust for saying masses or requiem for the souls of the dead is superstitious and void, though not actually



within the terms of 1 Edw. VI. c. 14 (1547) (*West v. Shuttleworth*, 1835, 2 Myl. & K. 684; *Heath v. Chapman*, 1854, 2 Drew. 417; *In re Blundell*, 1861, 30 Beav. 360; *In re Elliott*, 1891, 39 W. R. 297); but in Ireland such a gift is not illegal, though it may be void as creating a perpetuity (*Bradshaw v. Jackman*, 1887, 21 L. R. Ir. 12; *Dorsian v. Gilmore*, 1884, 15 L. R. Ir. 69). As to the question whether prayer for the dead is lawful in the Church of England, no such prayer occurs in the Book of Common Prayer, at all events in direct terms, but they are not prohibited by the Church (*Brecks v. Wolfrey*, 1838, 1 Curt. 880). In a recent case, however, Dr. Espin, Chancellor of the Diocese of Chester, refused to sanction an inscription containing an invitation to such a prayer, permitting instead the use of the words "*requiescat in pace*" (*Egerton v. All of Old Rode*, [1894] Prob. 15). But *query* as to soundness of the prohibitory part of this decision.

**Pray in Aid.**—See AID BY VERDICT AND (AID) PRAYER.

**Preamble.**—The proper function of a preamble is to explain certain facts which are necessary to be explained before the enactments contained in an Act of Parliament can be understood. For instance, the Courts of Justice Building Act, 1865, explains in the preamble the origin of the funds which were to be applied in the construction of the New Courts of Justice. A preamble may also be used for other reasons: to limit the scope of certain expressions, or to explain facts or introduce definitions (see Thring, *Practical Legislation*, p. 36).

In the *Sussex Peerage* case (1844, 11 Cl. & Fin. at p. 143), in the opinion of the judges, it is stated that "if any doubt arises from the terms employed by the Legislature, it has always been held a safe mean of collecting the intention, to call in aid the ground and cause of making the statute, and to have recourse to the preamble, which, according to Chief-Justice Dyer, is 'a key to open the minds of the makers of the Act, and the mischiefs which they intended to redress.'" In the case of the *Overseers of West Ham v. Iles* (1883, 8 App. Cas. at p. 388), Lord Blackburn said: "In construing an Act of Parliament, where the intention of the Legislature is declared by the preamble, we are to give effect to that preamble to this extent, namely that it shows us what the Legislature are intending; and if the words of the enactment have a meaning which does not go beyond that preamble, or which may come up to the preamble, in either case we prefer that meaning to one showing an intention of the Legislature which would not answer the purposes of the preamble or which would go beyond them. To that extent only is the preamble material."

[*Authorities.*—Hardcastle on *Statutes*, 2nd ed.; Maxwell, *Interpretation of Statutes*, 3rd ed.; Beale, *Cardinal Rules of Legal Interpretation*.]

**Pre-audience**—The precedence of being heard, which prevails at the bar according to the rank which counsel respectively hold. In the old Court of Exchequer there were two barristers appointed by the Lord Chief Baron, called the *post-man* and the *tub-man* (from the places in which they sat), who took precedence in motions (3 Black. Com. 28). See PRECEDENCE, PATENT OF.



**Prebend ; Prebendary.**—A prebend is an endowment in land or money given to a cathedral or conventual church *in præbendum*, that is, to maintain or support a secular priest or a regular canon who is known as a prebendary.

Prebendaries are of two kinds, simple and dignitary. A simple prebendary has no cure, and has only his prebend for his support; while a dignitary prebendary has a jurisdiction annexed. A prebendary may be generally defined as one who “has a stall in the choir and a vote in the chapter of a cathedral church.” By the Statute 3 & 4 Vict. c. 113, s. 1, all members of the chapters of cathedral churches are to be styled canons. As to prebendaries further, see article DEAN AND CHAPTER.

[*Authorities.*—Phillimore, *Eccl. Law*, 2nd ed.; Cripps, *Law of the Church and Clergy*.]

**Precarium.**—In Roman law this was a contract *ex re* whereby the usufruct of a thing was granted by its owner under the reservation that the latter might determine such usufruct at any moment (*Dig.* 43, 26, 4, 1). Hence the word *precarius* came to mean uncertain. As the owner was not in possession he was enabled to recover the thing granted by means of the possessory interdict *de precario* (*Dig.* 43, 26, 2 pr.). Not only moveables, but land and servitudes, might be so granted (*Dig.* 43, 26, 15, 2). So this seems to have been the nature of the interest which clients got from their patrons in the *ager publicus*. The term is used in Scots Law to denote a loan at will, as distinguished from one on time or for a special occasion (see Bell’s *Principles of the Law of Scotland*, s. 195; Erskine’s *Institutes*, 3. 1, s. 20; Van Leeuwen, 349).

## Precatory Trusts.

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I. *Definition.*—The term “precatory” only has reference to forms of expression (per Lindley, L.J., in *In re Williams, William v. Williams*, [1897] 2 Ch. at p. 19); and a precatory trust is one expressed by words of entreaty, recommendation, hope, or desire that the legatee or devisee under a will, or the grantee under a deed, will treat the gift as being for the benefit of other persons, exclusive of, or including himself (Godefroi’s *Trusts and Trustees*, 2nd ed., p. 144).

II. *Mode of creating Precatory Trusts.*—These trusts are usually created by will; but the doctrine on which they rest does not apply to wills exclusively, but extends likewise to settlements *inter vivos* (*Liddard v. Liddard*, 1860, 28 Beav. 266; per Lopes, L.J., in *Hill v. Hill*, [1897] 1 Q. B. at p. 488; Lewin on *Trusts*, 9th ed., p. 138); and, *semble*, there is no reason why a precatory trust should not be expressed in any letter or memorandum properly worded (*Hill v. Hill, ubi supra*; and see *McCormic v. Grogan*, 1869, L. R. 4 H. L. 82; *Rowbotham v. Dunnnett*, 1878, 8 Ch. D. 430, which were cases of secret trusts). Moreover, just as other trusts,



outside sec. 7 of the Statute of Frauds (29 Car. II. c. 3) can be created by word of mouth (see, per Lord Selborne, in *Lyell v. Kennedy*, 1889, 14 App. Cas. at p. 457; *Norris v. Frazer*, 1873, L. R. 15 Eq. 318), so, in like manner, can a precatory trust. Thus in *Irvine v. Sullivan*, 1869, L. R. 8 Eq. 673, where, shortly before the date of his will, a testator verbally expressed to D. his wish that she would, out of the property which he should leave her, make gifts to certain persons, and, afterwards, by his will, bequeathed the residue to her absolutely, "trusting that she will carry out my wishes with regard to the same, with which she is fully acquainted," it was held that D. took the residue of the testator's estate beneficially, but subject, nevertheless, to the performance of the testator's wishes verbally communicated to her, and which she had written down, at her own accord, and without submitting the paper to him for his signature (see also *Wood v. Cox*, 1836, 1 Keen, 317; *In re Fleetwood*, *Sidgreaves v. Brewer*, 1880, 15 Ch. D. 594; per Lopes, L.J., in *Hill v. Hill*, [1897] 1 Q. B. at p. 488).

III. *Requisites of a Precatory Trust*.—The effect of the older authorities on this subject (which it will presently be seen must not be extended) was, that when property was given absolutely to any person, accompanied by words of recommendation, entreaty, request, hope, or wish, such words were sufficient to create a precatory trust in favour of other persons, if the words used were, upon the whole, capable of being construed as *imperative* (Brett's leading cases in *Modern Equity*, 3rd ed., p. 19; see per Stuart, V.C., in *Eaton v. Watts*, 1867, L. R. 4 Eq. at p. 155; *Harding v. Glyn*, 1739, 1 Atk. 469, 470 n (1), by reason of their being accompanied by an explicit direction on the part of the testator or grantor, with regard to the subject-matter and the object or objects of the intended trust (Jarman on *Wills*, 5th ed., vol. i. pp. 356, 366, 367; 2 White and Tudor's *L. C. Eq.*, 7th ed., pp. 337 *et seq.*; *Cary v. Cary*, 1804, 2 Seh. & Lef. at p. 189; *Briggs v. Penny*, 1851, 3 Mac. & G. 546; *Bernard v. Minshull*, 1859, John. 276).

The general rule with regard to the requisites of precatory trusts was stated by Lord Langdale, M. R., in *Knight v. Knight*, 1840, 2 Beav. at pp. 172, 173, as follows:—

When property is given, absolutely, to any person, and the same is, by the giver who has power to command, recommended or entreated, or wished to dispose of that property in favour of another, the recommendation, entreaty, or wish, shall be held to create a trust.—*First*, if the words are so used that, upon the whole, they ought to be construed as imperative; *secondly*, if the subject of the recommendation or wish be certain; and, *thirdly*, if the objects or persons intended to have the benefit of the recommendation or wish be also certain.

These three requisites must, moreover, co-exist (*Briggs v. Penny*, 1851, 3 Mac. & G. 554; *Moriarty v. Martin*, 1852, 3 Ir. Ch. R. 26, 31; Lewin on *Trusts*, 9th ed., p. 141; and see *Webb v. Woods*, 1852, 2 Sim. N. S. 267; *Huskisson v. Bridge*, 1851, 4 De G. & Sm. 24). With regard to the *first* requisite, suffice it to state that no trust will be created if it appears from the context that the first taker is to have a discretionary power of withdrawing any part of the subject of the gift from the object thereof (*Knight v. Knight*, 1859, 3 Beav. 148; see also *Eade v. Eade*, 1820, 5 Madd. 118; 21 R. R. 384; *Sale v. Moore*, 1827, 1 Sim. 534; *In re Hamilton*, [1895] 2 Ch. 370); or if the subject is left "in the entire power" of the donee (*Eaton v. Watts*, 1867, L. R. 4 Eq. 151); or "entirely to his good judgment as he might think best" (*McCormick v. Grogan*, 1869, L. R. 4 H. L. 82); or to be "at sole and entire disposal" of the donee (*Scott v. Key*, 1865, 35 Beav. 291; *Hoy v. Master*, 1834, 6 Sim. 568); or otherwise at his absolute discretion (see *Lambe v. Eames*, 1871, L. R. 6 Ch. 597; *Stead v. Mellor*, 1877, 5 Ch. D.



225; *M Alinden v. M Alinden*, 1877, 11 Ir. R. Eq. 219). With regard to the *second* requisite, any uncertainty as to the amount or nature of the property to be given over, has always been held to negative the idea of a trust (*per curiam* in *Mussoorie Bank v. Raynor*, 1882, 7 App. Cas. at p. 331), as not merely creating a difficulty in regard to the execution of the trust itself, but as having a reflex action upon the precatory words used, and, in the case of a will, of throwing doubt upon the intention of the testator, and indicating that he could not possibly have intended his words of confidence, hope, or whatever they might be, to be imperative words (*ibid.*). With regard to the *third* requisite, it seems that, provided it be not left to the donee of the property to select the object of the gift in any manner he (the donee) may think proper, it suffices if it appears that a trust was intended, though the absolute object of such trust cannot be ascertained (*per Wood, V.C., in Bernard v. Minshull*, 1859, John. 277).

IV. *What Words have been held sufficient to raise a Precatory Trust.*—As regards precatory words which have been held to import a trust, it must be borne in mind that the Courts now regard less the actual words used than the whole context of the will or other document in which they are contained, and that none of the older decisions on this subject will be extended in any way (*per Cotton, L.J., in In re Adams and Kensington Vestry*, 1884, 27 Ch. D. at p. 410; *per Lindley, L.J., in In re Hamilton, Trench v. Hamilton*, [1895] 2 Ch. at p. 373; *per Lindley, L.J., in In re Williams, Williams v. Williams*, [1897] 2 Ch. at p. 18; *per curiam* in *Mussoorie Bank v. Raynor*, 1882, 7 App. Cas. at p. 330), it being now considered that, by the aid of the equitable doctrine of precatory trusts, the intentions of testators have too frequently been defeated (*per Lopes, L.J., in Hill v. Hill*, [1897] 1 Q. B. at 488; and see *per James, V.C., in Lambe v. Eames*, 1871, L. R. 6 Ch. 597, 599). Subject to these cautionary observations, the following list of precatory words, which have been held to be *imperative*, and to raise a trust, may not be without value:—

“Authorise and empower” (*Brown v. Higgs*, 1799, 4 Ves. 708; 5 Ves. 495; affirmed, 8 Ves. 561; 4 R. R. 323); “have full assurance and confident hope” (*Macnab v. Whitbread*, 1853, 17 Beav. 299); “feeling assured and having every confidence” (*Gully v. Cragoe*, 1857, 24 Beav. 185); “be well assured” (*Macey v. Shurmer*, 1739, 1 Atk. 389); “trusted that” (*Pilkington v. Boughey*, 1841, 12 Sim. 114); “trusting” (*Irvine v. Sullivan*, 1869, L. R. 8 Eq. 673); “trust and confide” (*Wood v. Cox*, 1836, 1 Keen, 317); “confiding” (*Griffiths v. Evans*, 1842, 5 Beav. 241; and see *Shepherd v. Nottidge*, 1862, 2 John. & H. 766); “have the fullest confidence” (*Shovelton v. Shovelton*, 1863, 32 Beav. 143; *Wright v. Atkyns*, 1810, 17 Ves. 255; 19 Ves. 299; *Palmer v. Simmonds*, 1854, 2 Drew. 221; *Curnick v. Tucker*, 1874, L. R. 17 Eq. 320; *Le Marchant v. Le Marchant*, 1874, L. R. 18 Eq. 414; *In re Hutchinson and Tenant*, 1878, 8 Ch. D. 540, 543; *Eaton v. Watts*, 1867, L. R. 4 Eq. at p. 155; *Smith v. Gibson*, 1871, 20 W. R. 88); “in the firm conviction” (*Barnes v. Grant*, 1856, 26 L. J. Ch. 92); “in the full belief” (*Fordham v. Speight*, 1875, 23 W. R. 782); “convinced” (*Hart v. Tribe*, 1854, 18 Beav. 215); “well knowing” (*Bardswell v. Bardswell*, 1838, 9 Sim. 319, 323; *Nowlan v. Nelligan*, 1785, 1 Bro. C. C. 489; *Briggs v. Penny*, 1851, 3 Mac. & G. 546; but see *Stead v. Mellor*, 1877, 5 Ch. D. 225; *Greene v. Greene*, 1869, Ir. R. 3 Eq. 90, 629); “of course he will give” (*Robinson v. Smith*, 1821, 6 Madd. 194); “apply the same at his discretion” (*Wainford v. Heyl*, 1875, L. R. 20 Eq. 321); “not doubting” (*Parsons v. Baker*, 1812, 18 Ves. 476; 11 R. R. 237; *Ray v. Adams*, 1834, 3 Myl. & K. 237); “desire” (*Harding v. Glyn*, 1739, 1 Atk. 469); “will and desire” (*Birch v. Wade*, 1814, 3 Ves. & Bea. 198; 13 R. R. 181; *Forbes v. Ball*, 1817, 3 Mer. 437; *Eales v. England*, 1704, 2 Vern. 466); “wish and desire” (*Liddard v. Liddard*, 1866, 28 Beav. 266); “wish and request” (*Foley v. Parry*, 1832, 5 Sim. 138; S. C., 2 Myl. & K. 138); “will” (*Cloudsley v. Pelham*, 1866, 1 Vern. 411); “will and declare” (*Gray v. Gray*, 1860, 11 Ir. Ch. 218); “order and direct” (*Cary v. Cary*, 1804, 2 Sch. & Lef. 189; *White v. Briggs*, 1847, 2 Ph. Ch. 583; *Wilson v. Bell*, 1869, L. R. 4 Ch. 581; but see *Barrs v. Fewks*, 1865, 34 L. J. Ch. 522); “it is my dying request” (*Pierson v. Garnet*, 1787, 2 Bro. C. C. 226); “requesting” (*Eade v. Eade*, 1820, 5 Madd. 118; 21



R. R. 384; *Bernard v. Minshull*, 1859, John. 276; but see *House v. House*, 1874, 31 L. T. N. S. 427; "entreat" (*Prevost v. Clarke*, 1816, 2 Madd. 458); "require and entreat" (*Taylor v. George*, 1814, 2 Ves. & Bea. 378); "beg" (*Corbet v. Corbet*, 1873, Ir. R. 7 Eq. 456); "most heartily beseech" (*Meredith v. Heneage*, 1824, 1 Sim. 542, 553; 27 R. R. 243); "advise" (*Parker v. Bolton*, 1835, 5 L. J. Ch. 98); "recommend" (*Malin v. Keighley*, 1794, 2 Ves. 333; *Tibbits v. Tibbits*, 1816, 19 Ves. 656; 23 R. R. 79; *Paul v. Compton*, 1803, 8 Ves. 380; 7 R. R. 81; *Cholmondelay v. Cholmondelay*, 1845, 14 Sim. 590; *Hart v. Tribe*, 1854, 18 Beav. 215). For other words which have been held to import a trust, as being in their nature imperative, see Lewin on *Trusts*, 9th ed., pp. 137, 138; Godefroi on *Trusts and Trustees*, pp. 145 *et seq.*; Jarman on *Wills*, 5th ed., vol. i. pp. 357 *et seq.*; 2 White and Tudor's *L. C. Eq.* pp. 339 *et seq.*; Theobald's *Law of Wills*, 4th ed., pp. 398 *et seq.*; 1 Atk. p. 470 *n* (1), and cases there cited. In this connection, it may be stated that all precatory words of the same character are not considered as of equal force (per Stuart, V.C., in *Eaton v. Watts*, 1867, L. R. 4 Eq. at p. 155). Thus "confidence," which was the old name for trust, was considered stronger than words of recommendation, or request, or of hope (*ibid.*). Indeed, as regards words of request, in their ordinary meaning, they convey a mere request, and not a legal obligation of any kind, either at law or in equity (per Lopes, L.J., in *Hill v. Hill*, [1897] 1 Q. B. at p. 486). On the other hand, a request is often a polite form of command, and not only in wills, but in daily life, an expression may be imperative in its real meaning, although couched in language which is not imperative in form (per Lindley, L.J., in *In re Williams, Williams v. Williams*, [1897] 2 Ch. at p. 19). Where the distinction between words is small, something will generally be found in the context to indicate the intention of the donor (*Eaton v. Watts, ubi supra*). Thus a trust has often been implied from powers of selection and distribution contained in wills (Jarman on *Wills*, 5th ed., vol. i. p. 517; 2 White and Tudor's *L. C. Eq.*, 7th ed., pp. 354 *et seq.*, and cases there cited). The leading case as to precatory trusts of *Harding v. Glyn*, 1739, 1 Atk. 469, is an example of this method of construction (see, per Lord Eldon, C., in *Brown v. Higgs*, 1803, 8 Ves. at p. 570; 4 R. R. 323; and see also *Burrough v. Philcox*; *Lacey v. Philcox*, 1840, 5 Myl. & Cr. 73, 92).

V. *The Modern Doctrine as to Precatory Trusts*.—There is an admitted conflict between modern authorities as to precatory trusts and the older authorities (see Sugden on the *Law of Property*, pp. 375 *et seq.*), and the tide is believed to have now completely set against raising a trust from precatory words alone, apart from their context. On this subject Lindley, L.J., thus expresses himself in the very recent case of *In re Williams, Williams v. Williams*, [1897] 2 Ch. at p. 18:—

There can be no doubt that equitable obligations, whether trusts or conditions, can be imposed by any language which is clear enough to show an intention to impose an obligation, and is definite enough to enable the Court to ascertain what the precise obligation is, and in whose favour it is to be performed. There is also abundant authority for saying that if property is left to a person in confidence, that he will dispose of it in a particular way, as to which there is no ambiguity; such words are amply sufficient to impose an obligation. . . . But still, in each case the whole will must be looked at; and, unless it appears from the whole will that an obligation was intended to be imposed, no obligation will be held to exist; yet, moreover, in some of the older cases, obligations were inferred from language which in modern times would be thought insufficient to justify such an inference.

The following cases quite bear out this statement of the modern doctrine as to precatory trusts, and show that the old decisions must, at all events, not be extended:—See, per Cotton, L.J., in *In re Adams and Kensington Vestry*, 1884, 27 Ch. D. at p. 410; per Lindley, L.J., in *In re Hamilton, Trench v. Hamilton*, [1895] 2 Ch. at p. 373; *per curiam* in *Hill v. Hill*, [1897] 1 Q. B. pp. 488, 493, 494 (C. A.); *In re Diggles*, 1888, 39 Ch. D. 253; *Lambe v. Eames*, 1871, L. R. 6 Ch. 597; *Stead v. Mellor*, 1877, 5 Ch. D. 225; *In re Hutchinson and Tenant*, 1878, 8 Ch. D. 540; *In re Moore, Moore v. Roche*, 1886, 34 W. R. 343; *Mussoorie Bank v. Raynor*, 1882, 7 App. Cas. 321, 330; *Mackett v. Mackett*, 1872, L. R. 14 Eq. 49; *In re Bond, Cole v. Hawes*, 1876, 4 Ch. D. 238; *Parnall v. Parnall*, 1878, 9 Ch. D. 96; *Eaton v. Watts*, 1867, L. R. 4 Eq. 151; *M'Alinden v. M'Alinden*, 1877, 11 Ir. R. Eq. 219; and see also *In re Elliott, Kelly v. Elliott*, [1896] 2 Ch. 353). Though, however,



modern decisions have somewhat modified the old authorities as to precatory trusts, the old doctrine itself has by no means been abolished (per Lindley, L.J., in *In re Williams, Williams v. Williams*, [1897] 2 Ch. at p. 18), and, as regards the requisites of a precatory trust, the old cases already cited on this subject retain their binding force (see *Hill v. Hill*, [1897] 1 Q. B. 483, 493; 2 White and Tudor's *L. C. Eq.*, 7th ed., pp. 343 *et seq.*; Godefroi's *Trusts and Trustees*, 2nd ed., pp. 148 *et seq.*; Theobald on *Wills*, 4th ed., pp. 399 *et seq.*).

VI. *Interest taken by the Donee of a Precatory Gift.*—There is a distinction between a gift *subject* to trusts and a gift *upon* trusts (Theobald on *Wills*, 4th ed., p. 401). In the former case the donee takes whatever is not required for the performance of those trusts (*ibid.*; and see *Clarke v. Hilton*, 1866, L. R. 2 Eq. 810; *Irvine v. Sullivan*, 1869, L. R. 8 Eq. 673; *Fenton v. Hawkins*, 1861, 9 W. R. 301; *Croome v. Croome*, 1888, 59 L. T. 582; *King v. Denison*, 1813, 1 Ves. & Bea. 261; 12 R. R. 227), while in the latter the donee takes the whole upon trust for the purposes declared, or, failing them, for the heir-at-law or next-of-kin of the donor (Theobald on *Wills*, 4th ed., p. 401). The cases on this subject are numerous, and frequently of difficulty, and the tendency of the Courts, in recent years, is not to decide the question on the consideration of any particular form of words, but to endeavour to gather the intention of the donor from the scope of the instrument; each case being thus made to rest upon its own particular circumstances and forms of expression used (2 White and Tudor's *L. C. Eq.*, 7th ed., p. 350; *Croome v. Croome*, 1888, 59 L. T. 582; 61 L. T. 814). For further information on this head, see Theobald on *Wills*, 4th ed., pp. 401 *et seq.*; 2 White and Tudor's *L. C. Eq.*, 7th ed., pp. 350 *et seq.*; Godefroi on *Trusts and Trustees*, 2nd ed., pp. 149 *et seq.*

VII. *How a Precatory Trust must be Executed.*—Any rule laid down in an instrument creating a precatory trust, as to its mode of execution, must be observed by the trustee, and the Court will itself execute the trust, if necessary (see *Gower v. Mainwaring*, 1750, 2 Ves. 87; *Salisbury v. Denton*, 1857, 3 Kay & J. 529). It is a universal proposition that a trustee ought strictly to pursue the tenor of his trust, without perverting it, directly or indirectly, to his own personal advantage; and, when he fails in performing his duty, it is the office of a Court of Equity to interpose and guide him, and decree what shall be done (*Richardson v. Chapman*, 1760, 7 Bro. P. C. 318). Where absolute discretion has been given to trustees as to the exercise of a power, the Court will not compel them to exercise it, but, if they propose to exercise it, the Court will see that they do not exercise it improperly and unreasonably (*Tempest v. Lord Camoys*, 1882, 21 Ch. D. 571 (C. A.)). Where, however, the power is coupled with a trust or duty, the Court will enforce the proper and timely exercise of the power, but will not interfere with the discretion of the trustees as to the particular time or manner of their *bonâ fide* exercise of it (*Tempest v. Lord Camoys, supra*). The Court will likewise control trustees if they exercise their powers in an arbitrary and unreasonable manner (2 White and Tudor's *L. C. Eq.*, 7th ed., p. 365; *In re Hodges, Davey v. Ward*, 1878, 7 Ch. D. 754). Where a power, in the nature of a trust, gives the trustees liberty to distribute a fund *unequally*, they may do so, but if the Court interpose, on default by the trustees, it will divide the fund among the objects *equally* (2 White and Tudor's *L. C. Eq.*, 7th ed., p. 362). If, however, such power authorises only an equal distribution, this will be equivalent to a gift to the objects, because the trustees can only exercise the power in the same manner as the Court would do (*ibid.*; and see *Phillips v. Garth*, 1790, 3 Bro. C. C. 64;



*Rayner v. Mowbray*, 1791, 3 Bro. C. C. 234). Where a precatory trust has been created in favour of a class, the trustee may, in executing the trust, limit the share of a female member of the class to her separate use (*Willis v. Kyner*, 1877, 7 Ch. D. 181).

[*Authorities*.—All the principal authorities are cited in the text.]

**Precedence, Patent of.**—Letters patent of precedence are grants whereby the ordinary precedence of an individual, which he takes by virtue of his social or professional rank, is set aside, and he is assigned some higher position. The most important interference with the scale of precedence in the various professions which the Crown has exercised, is in regard to the precedence of the various classes of advocates practising in the Courts of justice; this right being closely connected with the right of pre-audience upon many occasions. In the legal profession precedence was determined by the regulations and usages of the Courts; and Sir Edward Coke (*Inst.* iv. p. 71), speaking of the King's Bench, says that the proceedings there under so many honourable judges and sages of the law hath gotten such a foundation as cannot now without an Act of Parliament be shaken. And in *The Serjeants'* case (Man. Rep. 25) the question is raised, "Whether the judges would be bound to obey an order from the Crown to hear one counsel before another?" And the answer is: "The Crown may exercise a prerogative that is consistent with the usage of the Court."

The King's Counsel, down to Lord Bacon's time, who had recognised precedence and pre-audience over all others, were the King's Serjeants and the Attorney- and Solicitor-General. King's Counsel extraordinary were afterwards somewhat rarely appointed until the reign of George III., when their creation became more common. This class of advocates, now known as King's or Queen's Counsel (*q.v.*), were appointed by patent, and precedence was given them thereby over the Serjeants-at-Law (*q.v.*). After the serjeants lost their monopoly in the Court of Common Pleas, it was customary to grant patents of precedence to those of them whose professional reputation warranted it; so that they obtained rank and precedence immediately after the counsel of the Crown already created, and before those of subsequent creation. These patents were also granted to barristers upon whom it was desired to confer a mark of distinction, without subjecting them to the disabilities under which counsel to the Crown were subject as holding office under the Crown. Mostly they were conferred upon barristers who were members of the House of Commons, whose seats would have been vacated if they had been appointed counsel to the Crown. This was the motive in such distinguished cases as those of Mansfield, Erskine, Eldon, and Brougham.

Serjeant Pulling in *The Order of the Coif*, p. 200, thinks these patents of doubtful legality, as being against the established usage of the Courts; but adds that they have never really been called in question.

Holders of the patents sat within the Bar with the counsel of the Crown.

It has now become very unusual to grant them. Mr. Justice Phillimore was the only holder of such a patent at the Bar on his appointment to the Bench in 1897, with the exception of Serjeant Simon, who died in that year, and was the last of the serjeants who held a patent of precedence.

[*Authority*.—Pulling, *Order of the Coif*.]



**Precedence; Precedency.**—Precedence, or the rank which subjects bear in the State in regard to each other, was determined at common law by virtue of the sovereign's prerogative. The various ranks of the Peerage (*q.v.*) had been so created, and newer creations made of higher rank than the older ones. The discontent aroused thereby, and by grants of patents of precedence amongst persons of the same rank, led to the subject being dealt with by statute in 1539. This statute (31 Hen. VIII. c. 10) was the first which dealt with the subject of precedence; and it contains the recital that it appertained to the king's prerogative royal to give such honour, reputation, and placing to his counsellors and subjects as might please him. The Act is called an Act for the placing of the Lords in the Parliament. It deals with the seats of the great officers of State in the House of Lords, and otherwise only provides that the other lords should sit and be placed according as they had been accustomed. But orders of precedence had long before established a scale for both the nobles and the gentry of England. The first was in 1339, and the last in the time of Henry VII., which is mentioned in the *Institutes* (pt. iv. p. 363) as having fixed the places of "both the sons, wives, and daughters of Lords of Parliament, as dukes, marquises, earls, viscounts, and barons, and of bannerets, knights, esquires, and gentlemen, and of their wives and children."

This statute and the above regulations have governed the subject of precedence ever since; but they have been altered and extended from time to time by numerous other statutes and ordinances.

The creation of the order of baronets (*q.v.*), and that of various orders of knighthood, to which various degrees of precedence have been given, have been the chief elements in the alteration of the old scale of general or social precedence.

In the *Institutes* (*supra*), it is said that the question of the precedency of any Lord of Parliament is decided by the House of Lords, as privileges concerning the House of Commons are to be decided by that House; and that the determination of the places and precedences of others doth belong to the Court of the CONSTABLE AND MARSHAL (*q.v.*), "unless any question ariseth upon the said Act of Parliament of 31 Hen. VIII., for that being part of the law of the realm (as all other statutes be), is to be decided by judges of the common law."

The judges, however, do not appear ever to have been occupied with such cases.

It is upon the occasions of State functions, such as the coronation of the sovereign, and of Court ceremonies, that the due ordering of various classes of subjects becomes of importance, and the State officers intrusted with them, and the College of HERALDS (*q.v.*), are the authorities whose judgments are sought.

The scale of general or social precedence, irrespective of academic or professional distinctions, which depend on other principles than the general scale, is well determined. It may be said, however, that the scale set out in all the editions of Blackstone's *Commentaries* are imperfect and unreliable. They confuse together the general scale and the professional scale, and they take no account of the changes that have been made by legislation and patents in the present reign, nor of the creation of the modern orders of knighthood.

The above-mentioned Statute of Henry VIII. forms the solid foundation of the scale of precedence. It settles the precedence of the princes of the blood, of the archbishops, of the Lord Chancellor, and the other great officers of State and the royal household, and of the peerage. Interposed between



these classes are certain ranks which are determined by a well-ascertained usage, *e.g.* that of eldest sons of dukes of the blood royal, whose places are not ascertained in the Act, but from an ancient table of precedence in the College of Arms, according to which they were assigned that place in 1399.

In the same way, the position of dukes' eldest sons has been fixed from the same date (Dod, *Peerage*, etc.).

In consequence of the successive unions of the kingdoms of Scotland and Ireland with England, the precedence of their several nobility had to be determined. By the 5 & 6 Anne, c. 8 (6 Anne, c. 11, in the Revised Statutes), confirming the Articles of Union, Article xxiii. was confirmed, which provided that all peers of Scotland and the successors to their honours and dignities should have rank and precedence next, and immediately after the peers of the like orders and degrees in England at the time of the Union, and before all peers of Great Britain of the like orders and degrees which should be created after the Union.

The Act of Union between Great Britain and Ireland in 1800 (39 & 40 Geo. III. c. 67) provided that all lords spiritual of Ireland should have rank and precedence next and immediately after the lords spiritual of the same rank and degree of Great Britain; and that the persons holding any temporal peerages of Ireland existing at the time of the Union should, from and after the Union, have rank and precedence next and immediately after all the persons holding peerages of the like orders and degrees in Great Britain subsisting at the time of the Union; that all peerages of Ireland created after the Union should have rank and precedence with the peerages of the United Kingdom so created according to the dates of their creations.

One or two points in the scale may be mentioned which the Act as thus modified determines. The Archbishop of Canterbury is the first in rank after the family of the sovereign; the Lord Chancellor (if he is a peer) the second; the Archbishop of York the third. The Bishops of London, of Durham, and of Winchester rank in the order named, and all the other bishops before the baronage.

By the Act 1 Will. & Mary, c. 21, s. 1, for enabling the Commissioners of the Great Seal to execute the office of Lord Chancellor, it is declared that the Commissioners shall have and take place next after the Peers and Speaker of the House of Commons, unless any of them shall happen to be a peer, and then according to his peerage. These words confirm the place of the Speaker of the House of Commons, which, in fact, depends on ancient usage.

Knights of the Garter, Privy Councillors, the Chancellor of the Exchequer, the Chancellor of the Duchy of Lancaster, the Chief-Justices and Chief Baron of the Exchequer (now the Lord Chief-Justice), the Master of the Rolls, and the other judges of the degree of the Coif, as well as the younger sons of viscounts, were assigned their precedence by an Ordinance of the tenth year of the reign of James I. (1612).

The Lords Justices of Appeal take their precedence under the Court of Appeal in Chancery Act, 1851 (14 & 15 Vict. c. 83, s. 3), confirmed to the Lords Justices of the Court of Appeal created by the Judicature Acts, 1873 and 1875; and also the judges of the High Court, now, under the latter Acts.

Baronets were given their precedence on the creation of the order in the ninth year of James I., and in the tenth year of the same reign the above-mentioned Ordinance determined the question of precedence which arose between the younger sons of viscounts and barons and the new order.



The knights and companions of the various orders are assigned their precedence by their respective statutes.

Judges of County Courts have their precedence under a Royal Warrant of the 4th August 1884.

The ground of the precedence of the other ranks will be noted in the scale itself as given below.

As to the rank and precedence of a peeress in her own right, see PEERAGE; otherwise the rank of wives depends on that of their husbands; except in the case of the great officers of State and others of official rank, *e.g.* the archbishops and bishops, whose wives have no consequent precedence, nor do their children take rank as the children of the temporal peerage. See, as to the precedence of women, the Peerages of Burke and Dod.

In addition to the general precedence, there are various other distinctions which are considered of importance. Chief amongst these is diplomatic precedence, which is based upon agreements of the Powers at the Congresses of Vienna in 1815, and of Aix-la-Chapelle in 1818. Ambassadors yield precedence only to the members of the Royal Family at the Courts they are accredited to, and to the sons and brothers of sovereigns; but other diplomatic personages cannot claim this precedence, and in England they are placed after dukes and before marquesses.

There is the precedence at the Castle of Dublin, at the Court of the Lord High Commissioner to the General Assembly of the Church of Scotland, at the Viceroy's Court in India, at the Governor-General's in Canada, which is based upon official positions held by men in India and Canada.

Knightly precedence, professional, and academic precedence need not be more than mentioned.

#### SCALE OF PRECEDENCE.

|                                                                      |                                        |
|----------------------------------------------------------------------|----------------------------------------|
| Sovereign.                                                           |                                        |
| Prince of Wales.                                                     |                                        |
| Sovereign's younger sons.                                            |                                        |
| „ grandsons.                                                         |                                        |
| „ brothers.                                                          |                                        |
| „ uncles.                                                            |                                        |
| „ nephews.                                                           |                                        |
| Archbishop of Canterbury.                                            |                                        |
| Lord Chancellor (if a peer).                                         |                                        |
| Archbishop of York.                                                  |                                        |
| Lord Chancellor of Ireland.                                          |                                        |
| Lord High Treasurer                                                  | } If barons.                           |
| Lord President of the Privy Council                                  |                                        |
| Lord Privy Seal                                                      |                                        |
| Lord Great Chamberlain                                               |                                        |
| Lord High Constable                                                  | } Above all peers of their own degree. |
| Earl Marshal                                                         |                                        |
| Lord High Admiral                                                    |                                        |
| Lord Steward of the Household                                        |                                        |
| Lord Chamberlain of the Household                                    |                                        |
| Dukes of England.                                                    |                                        |
| „ Scotland.                                                          |                                        |
| „ Great Britain.                                                     |                                        |
| „ Ireland.                                                           |                                        |
| „ United Kingdom, and Dukes of Ireland created since the Union.      |                                        |
| Eldest sons of Dukes of the Blood Royal.                             |                                        |
| Marquesses of England.                                               |                                        |
| „ Scotland.                                                          |                                        |
| „ Great Britain.                                                     |                                        |
| „ Ireland.                                                           |                                        |
| „ United Kingdom, and Marquesses of Ireland created since the Union. |                                        |



- Dukes' eldest sons.
- Earls of England.
  - „ Scotland.
  - „ Great Britain.
  - „ Ireland.
  - „ United Kingdom, and Earls of Ireland created since the Union.
- Younger sons of Dukes of the Blood Royal (ancient usage).
- Viscounts of England.
  - „ Scotland.
  - „ Great Britain.
  - „ Ireland.
  - „ United Kingdom, and Viscounts of Ireland created since the Union.
- Earls' eldest sons (usage from fourteenth century).
- Marquesses' younger sons (usage from fourteenth century).
- Bishop of London.
  - „ Durham.
  - „ Winchester.
- English bishops (according to seniority of consecration).
- Moderator of the General Assembly of the Church of Scotland (granted by Her Majesty).
- Irish bishops (consecrated before the Disestablishment Act, according to their seniority of consecration).
- Secretary of State, and Chief Secretary to the Lord-Lieutenant of Ireland, if a baron ; if of higher degree, he does not have the precedence over those of his own rank (Coke, *Inst.* p. 361).
- Barons of England.
  - „ Scotland.
  - „ Great Britain.
  - „ Ireland.
  - „ United Kingdom, and Barons of Ireland created since the Union.
- Speaker of the House of Commons.
- Commissioners of the Great Seal.
- Treasurer of the Household (warrant of 1540).
- Comptroller of the Household (warrant of about the same time).
- Master of the Horse (is always a peer, and takes rank accordingly).
- Vice-Chamberlain of the Household (warrant of Henry VIII.).
- Secretary of State, and Chief Secretary to the Lord-Lieutenant of Ireland (if under the degree of baron).
- Viscounts' eldest sons (Order of the Constable of England in 1467).
- Earls' younger sons (by the same Order).
- Barons' eldest sons (usage).
- Knights of the Garter.
- Privy Councillors.
- Chancellor of the Exchequer.
- Chancellor of the Duchy of Lancaster.
- The Lord Chief-Justice.
- Master of the Rolls.
- The Lords Justices, including *ex officio* the President of the Probate Division.
- Judges of the High Court.
- Bannerets (knights created under the royal banner in open war, the Sovereign or the Prince of Wales being present—by custom).
- Viscounts' younger sons.
- Baronets.
- Bannerets not made by the Sovereign in person (usage).
- Knights Grand Cross of the Bath.
  - „ „ Commanders of the Star of India.
  - „ „ Cross of St. Michael and St. George.
  - „ „ Commanders of the Order of the Indian Empire.
- Knights Commanders of the Bath.
  - „ „ of the Star of India.
  - „ „ of St. Michael and St. George.
  - „ „ of the Order of the Indian Empire.
- Knights Bachelors (by many Acts and Ordinances, which have assigned other classes precedence over them).
- Judges of County Courts.
- Serjeants-at-Law (usage).



Companions of the Bath.

„ of the Star of India.

„ of St. Michael and St. George.

„ of the Order of the Indian Empire.

„ of the Distinguished Service Order.

Eldest sons of the younger sons of Peers (an Ordinance of Earl Marshal's Court, 1615).

Eldest sons of Baronets (the same).

Eldest sons of Knights of the Garter (usage).

Eldest sons of Bannerets (usage from fourteenth century).

Eldest sons of the various classes of knights, according to their father's precedence.

Baronets' younger sons.

Knights' younger sons.

Esquires (*q.v.*).

Gentlemen (*q.v.*).

See EARL MARSHAL; PEERAGE; SOVEREIGN.

[*Authorities.*—Burke, *Peerage*; Dod, *Peerage*.]

### **Precedent Conditions.**—See CONDITIONS.

**Precedents.**—1. The principle upon which an actually decided case in the High Court or the Court of Appeal or the House of Lords has been decided, constitutes a rule of law to be followed in subsequent cases by Courts of co-ordinate jurisdiction with (below 2.), or of inferior jurisdiction to, the Court which decided the case (*In re Hallett's Estate*, 1879, 13 Ch. D. at p. 712). The binding authority of precedents is characteristic of English law. It can be traced in the common law as far back as the fourteenth century (Pollock's *First Book of Jurisprudence*, ch. vi.). In equity, also, great deference was paid to precedents from the earliest times to which the records can be traced (3 Blackstone, p. 432; Kerly, *History of Equity*, pp. 100, 188), and during the present century they have been as binding in equity as at law.

2. As regards a Court of co-ordinate jurisdiction, the rule that the decision of another Court must be followed has been said to be a rule of comity only (Brett, L.J., *The Vera Cruz*, 1884, 9 P. D. at p. 98), and that a judge may dissent if he thinks the principle of the earlier case wrong (Jessel, M. R., in *Osborne v. Rowlett*, 1880, 13 Ch. D. at p. 785; and *Gathercole v. Smith*, 1881, 44 L. T. at p. 441). But the rule above stated is generally put as an absolute one (*Palmer v. Johnson*, 1884, 13 Q. B. D. at p. 355; *Cason v. Churchley*, 1883, 53 L. J. Q. B. at p. 336). The practice is to very rarely depart from a decision of a co-ordinate Court which is cited and is in point. Cases are very frequently, however, practically departed from by refined or unreal distinctions (see the elaborate collections in such works as Dale and Lehmann's *Digest of Cases overruled, not followed*, etc.). As an example, cp. *Sheffield v. London Joint-Stock Bank*, 1888, 13 App. Cas. 333, and *Simmons v. London Joint-Stock Bank*, [1892] App. Cas. 201.

3. Where a case is "contrary to the current of earlier authority" it need not be followed (*In re Klæhe*, 1884, 28 Ch. D. at p. 180; Blackstone, *ubi supra*). Where there are conflicting decisions of judges or Courts of co-ordinate jurisdiction, the judge or Court must take their choice. In the House of Lords the more recent of its decisions ought to be followed (*Campbell v. Campbell*, 1880, 5 App. Cas. at p. 798).

4. If on an appeal the judges are equally divided, a co-ordinate Court is not bound by the decision of the case (*The Vera Cruz*, 1884, 9 P. D. 96).



5. The Court of Appeal is not bound by the decision of a Court of first instance, nor the House of Lords by a decision of the Court of Appeal; but if a decision (or dictum, *In re Rosher*, 1884, 26 Ch. D. 821—a note in an old text-book) of the subordinate Court has laid down a rule which has long been acted upon, the superior Court will generally follow it, even if the rule be disapproved of (*Pugh v. Golden Valley Rwy. Co.*, 1880, 15 Ch. D. 330; *Smith v. Keal*, 1882, 9 Q. B. D. at p. 352; *Bain v. Fothergill*, 1874, L. R. 7 H. L. at p. 209). This practice especially applies where the rule adopted is one of conveyancing (*In re Lashmar*, [1891] 1 Ch. at p. 268, Bowen, L.J.); where contracts are likely to have been made on the footing of it (*Ex parte Lickorish*, 1890, 25 Q. B. D. 176); and where it affects the interpretation of mercantile documents (*Palmer v. Johnson*, 1884, 13 Q. B. D. at p. 355; *Pandorf v. Hamilton*, 1886, 17 Q. B. D. at p. 674). It applies to a rule of procedure (*Fraser v. Ehrensperger*, 1883, 12 Q. B. D. at p. 318), but not to a decision as to the jurisdiction of an inferior Court (*R. v. Edwards*, 1884, 13 Q. B. D. at p. 590). It has no application if the decision in point has frequently been questioned (*Pearson v. Pearson*, 1884, 27 Ch. D. 145, itself disapproved in *Trego v. Hunt*, [1896] App. Cas. 7).

6. It is now determined that when the House of Lords has given a deliberate decision upon a question of law, it will not in any subsequent case treat the correctness of such decision as open to argument (*London Street Tram. Co. v. L. C. C.*, 1898, W. N. p. 40; per Lord Blackburn, *Houldsworth v. City of Glasgow Bank*, 1880, 5 App. Cas. at p. 335; and *Beamish v. Beamish*, 1861, 9 H. L. 274). The Judicial Committee of the Privy Council does not hold itself so completely bound by its former decisions (*Read v. Bishop of Lincoln*, [1892] App. Cas. 644); and see CONCURRENT FINDINGS.

7. The Court of Appeal holds itself bound by its own decisions, and by those of the old Lords Justices and Court of Exchequer Chamber (*Pledge v. Carr*, [1895] 1 Ch. at p. 52; *Lavy v. L. C. C.*, [1895] 2 Q. B. at p. 581), but not absolutely by the decisions of the Lord Chancellor sitting alone (Thesiger, L.J., in *Wheeldon v. Burrows*, 1879, 12 Ch. D. at p. 54; cp. *In re Watts*, 1885, 29 Ch. D. at p. 953). The full Court of Appeal may overrule decisions of a lesser number of its members (*Kelly v. Kellond*, 1888, 20 Q. B. D. at p. 572).

8. Nisi Prius rulings are not treated as absolutely binding even on judges of first instance (*Parton v. Williams*, 1820, 3 Barn. & Ald. at p. 341; 22 R. R. at p. 422).

9. The opinions of the Judicial Committee of the Privy Council are treated with great respect by the High Court and Court of Appeal, but not as of binding authority (*Leask v. Scott*, 1877, 2 Q. B. D. at pp. 376, 380). In Admiralty and mercantile cases, on points of law common to England and the colonies, especial weight is given to them (*City of Chester*, 1884, 9 P. D. at p. 207).

10. The decisions of Scotch or Irish Courts are similarly treated as entitled to respect (*R. v. Income Tax Commissioners*, 1888, 22 Q. B. D. at p. 313; *In re Parsons*, 1890, 45 Ch. D. at p. 63), but they are not invariably followed (*l.c.*; *Morgan v. London and General Omnibus Co.*, 1883, 12 Q. B. D. 201). American cases may be cited as showing the opinions of learned persons (*Lord Watson, Castro v. R.*, 1881, 6 App. Cas. at p. 249); and see AMERICAN LAW.

11. The authority of precedents upon the construction of documents (not being documents in a common form, see above 5.) is often denied (*In re New Callao Co.*, 1882, 22 Ch. D. 488; *Hack v. London Provident Building*



*Society*, 1883, 23 Ch. D. 111, Jessel, M. R.). As to the construction of will, see WILL, and the preface to Theobald on *Wills*. Where the law has been codified by an Act of Parliament, old precedents can only be referred to where the construction of the code itself is doubtful (*Robinson v. Canadian Pacific Rwy. Co.*, [1892] App. Cas. 481).

12. A decision affirmed by the Court of Appeal on "other grounds" is practically overruled (*Hack v. London Provident Building Society*, 1883, 23 Ch. D. 111).

[*Authorities*. — Sir Frederick Pollock, *op. cit.*; Fisher's *Digest*, title "Decided Cases."]

**Preceding Twelve Months.**—See Valuation (Metropolis) Act, 1869, s. 46; *R. v. East and West India Docks Co.*, 1884, 13 Q. B. D. 364.

**Preces primariæ, or primæ**—An imperial right of presentation to the first prebend that fell vacant in every church of the Holy Roman Empire after the accession of an emperor. Edward I. is said to have exercised a similar right in England, and this is supposed to have been the origin of corodies, or the king's right (now in desuetude) to have one of the royal chaplains maintained by a bishop till the latter should give him a benefice. See CORODY.

**Precinct.**—This word is usually applied to the enclosed grounds about some important edifice, as a palace or cathedral. It is derived from the Latin *præ* and *cingere*, and may in loose language be made to refer to any district that is, so to speak, encompassed as with a girdle or has fixed boundaries or limits. Thus various minor territorial or jurisdictional divisions are so styled, as, for example, election precincts, school precincts, constables' precincts, etc. In the United States a parish or district attached to a church and taxed for its support is so called.

**Precontract.**—Previously, in 1754, a contract or promise of marriage was an impediment to a subsequent union of a party to it with another person. If the contract were *per verba de præsentī*, e.g. in the words "I marry you," "you and I are man and wife," neither party to it could release the other; but if it were *per verba de futuro*, as "I will marry" or "promise to marry you," it was releasable (*Jesson v. Collins*, 1704, 2 Salk. 437, per Holt, C.J.), unless it were followed by cohabitation. If the spiritual Court pronounced against the contract, no action for damages lay in the civil Court (*Dacosta v. Villa Real*, 1734, 2 Stra. 961); and, on the other hand, an action for damages waived the spiritual remedy (*Jesson v. Collins, ubi supra*). On proof of a contract *per verba de præsentī*, a subsequent marriage was declared void by the Court. In 1540 the impediment of precontract was for a time abolished by 32 Hen. VIII. c. 38; but 2 & 3 Edw. VI. c. 23, 1548, reciting that the removal of the impediment had led to gross abuses, enacted that thenceforward the ecclesiastical judge should hear and examine any cause or contract of marriage pretended to have been made, and if he held it proved, make an order for the specific performance of the contract, under such penalties as could be imposed before 1540.



This jurisdiction was taken away by Lord Hardwicke's Act (26 Geo. II. c. 33, s. 13, 1753), re-enacted by 4 Geo. IV. c. 76, s. 27, 1823; and a pre-contract, even *per verba de præsenti*, is now no barrier to a subsequent marriage (*Beachey v. Brown*, 1860, El. B. & E. 796). See also MARRIAGE.

[*Authorities*.—Swinburne, *Spousals*, 1686; Geary, *Law of Marriage and Family Relations*, 1892.]

**Predecessor**—One who has preceded another. In the Success. D. A. 1853, s. 2, the term "predecessor" is defined as denoting the settlor, disponent, testator, obligor, ancestor, or other person from whom the interest of the successor is or shall be derived. See *A.-G. v. Floyer*, 1862, 31 L. J. Ex. 404; *A.-G. v. Braybrooke*, 1860, 31 L. J. Ex. 177; *Charlton v. A.-G.*, 1879, 49 L. J. Ex. 86; *A.-G. v. Mitchell*, 1881, 50 L. J. Q. B. 406; *In re Barker*, 1861, 30 L. J. Ex. 404.

See DEATH DUTIES. See also ANCESTOR.

**Pre-emption**.—A right of pre-emption is properly a right, in the event of a sale, to purchase the property upon agreed terms, *e.g.* at a price equal to the best price offered by any third party to the owner. An option to purchase within a given time, or at any time, without reference to any intended sale to a third party, is often included under the same name.

A right of pre-emption is strictly construed. All conditions precedent must be fulfilled before there is any contract binding on the grantor (*Dart's Vendors and Purchasers*, ch. vi. s. 3; *Austin v. Tawney*, 1867, L. R. 2 Ch. 143; *Weston v. Collins*, 1865, 11 Jur. N. S. 190). A verbal notice to exercise the right in the case of land is not binding (*Dawson v. Dawson*, 1837, 8 Sim. 346; see next case), apart from part performance. The retention of possession by a lessee with option of purchase, after a verbal notice, has been held to be sufficient (*Beetson v. Nicholson*, 1842, 6 Jur. 620). Whether a notice to exercise a right of pre-emption can be withdrawn (*Humphrey v. Fothergill*, 1866, L. R. 1 Eq. 567), and whether if the notice is given and the giver fails to complete the right is lost (*Ward v. Wolverhampton Waterworks Co.*, 1871, L. R. 13 Eq. 243), are questions of construction of the instrument conferring the right. If the notice is properly given, it constitutes a contract which will be specifically enforced (*Humphrey v. Fothergill*, *supra*).

A right of pre-emption unlimited in time is not void as a perpetuity (*Birmingham Canal Co. v. Cartwright*, 1879, 11 Ch. D. 421). It is not limited to the person of the grantee, or the life of the grantor, unless the circumstances of the case, or the true construction of the contract or Act creating it, show that such was the intention of the grant or of the Legislature (*Birmingham Canal Co. v. Cartwright*, *supra*; cp. *Stocker v. Dean*, 1852, 16 Beav. 161; *Highgate Archway Trustees v. Jeakes*, 1871, L. R. 12 Eq. 9), *e.g.* the right under the Lands Clauses Act (see below) is not a personal right (*Lord Carington v. The Wycombe Rwy. Co.*, 1868, L. R. 3 Ch. 377).

Fiduciary vendors, *e.g.* trustees, ought not to give a right of pre-emption at a fixed price (*Clay v. Rufford*, 1852, 5 De G. & Sm. 768). A right of pre-emption of the share of a retiring partner is very frequently given by the articles of partnership to the continuing partners; as to this, see Lindley on *Partnership*, 6th ed., p. 424, and *Humphrey v. Fothergill*, *supra*. Where the partnership continues at will beyond the agreed term, the clause as to pre-emption continues to operate (*Daw v. Herring*, [1892] 1 Ch. 284).



As to the right of pre-emption in regard to "superfluous lands" taken under the LANDS CLAUSES ACTS, see vol. vii. at p. 286; see also PRE-EMPTION (INTERNATIONAL).

**Pre-emption (International).**—The act or right of purchasing in preference to others. In international law it is the purchasing of neutral contraband goods in lieu of confiscation.

"In strictness," Hall observes, "every article which is either necessarily contraband, or which has become so from the special circumstances of the war, is liable to confiscation; but it is usual for those nations who vary their list of contraband to subject the latter class to pre-emption only, which by English practice means purchase of the merchandise at its mercantile value, together with a reasonable profit, usually calculated at ten per cent. on the amount. This mitigation of extreme belligerent privilege is also introduced in the case of products native to the exporting country, even when they are affected by an inseparable taint of contraband"

(*Int. Law*, p. 691).

Pre-emption is provided for by the Naval Prize Act, 1864, sec. 38 of which runs as follows:—

Where a ship of a foreign nation passing the seas laden with naval or victualling stores, intended to be carried to a port of any enemy of Her Majesty, is taken and brought into a port of the United Kingdom, and the purchase for the service of Her Majesty of the stores on board the ship appears to the Lords of the Admiralty expedient, without the condemnation thereof in a Prize Court, in that case the Lords of the Admiralty may purchase, on the account or for the service of Her Majesty, all or any of the stores on board the ship; and the Commissioner of Customs may permit the stores purchased to be entered and landed within any port

(27 & 28 Vict. c. 25). See CONTRABAND OF WAR; PRIZE.

**Preference Stock.**—See vol. iv. 198; 1863, c. 118, ss. 13–15; 1868, c. 119, s. 13.

**Preferential Debts; Payments.**—See vol. i. 517; vol. v. 508, 509.

**Pregnancy.**—See MEDICAL JURISPRUDENCE, vol. viii. at p. 327. As to plea of, see MATRONS, JURY OF.

**Prejudice.**—Statements by or on behalf of one party to a dispute to the other party thereto, or his agent, made in the course of an attempt to settle the dispute, and relating to the matter in dispute, under an express or implied stipulation that the statements are to be *without prejudice* to the claims or contention of the party making them, if the attempted settlement is not effected, cannot be put in evidence against him for any purpose in litigation pending, or subsequently undertaken, to determine the dispute (*Walker v. Wilshire*, 1889, 23 Q. B. D. 335; Taylor on *Evidence*, ss. 774, 795). It makes no difference whether the statements are written or verbal. The words "without prejudice" mean without prejudice to the writer if the terms of settlement he proposes are not accepted. If the terms are accepted, a complete contract is established, and the offer, though made without pre-



judice, operates to alter the old state of things and to establish a new one, so that the contract made may be enforced as any other contract (per Lindley, L.J., in *Walker v. Wilshire*). The Court cannot, therefore, consider an offer so made, or the reply to it, even on the question of costs, as, for instance, in order to see if there is "good cause" for depriving a plaintiff who has obtained a verdict of costs (*l.c.*). But for some purposes, *e.g.* upon a question of *laches* (see ACQUIESCENCE), the Court may take notice of the fact that there has been an offer or negotiation (per Lindley, L.J., *ibid.*). The rule is one of public policy, and is adopted in order to enable parties to negotiate compromises.

It is not necessary that the stipulation should be explicitly made. Any offer made for the sake of peace will usually be construed not to be a relevant admission. "Any admission or confession made by the party respecting the subject-matter of the action, and obtained while a treaty was depending under faith of it, and into which the party might be led by confidence of a compromise taking place, could not be admitted in evidence to his prejudice" (per Lord Kenyon in *Waldridge v. Kennison*, 1794, 1 Esp. 144).

The question often arises whether part only of a letter, conversation, or communication is protected, or the whole of it. It is well settled that the whole of the negotiation upon an offer made without prejudice is covered by the stipulation (*Paddock v. Forrester*, 1842, 3 Man. & G. 913; *Ex parte Harris*, 1875, 44 L. J. Bank. 33). And no part of a conversation begun without prejudice is admissible (*Thomson v. Austen*, 1823, 2 Dow. & Ry. 361), at least unless there is clear proof of a break. But evidence of an admission as to a matter not really in dispute, and not the subject of the discussion, has been admitted, *e.g.* the signature of the defendant to a bill on which he is sued (*Waldridge v. Kennison*, *supra*).

For the rule to apply there must be a dispute. So a notice to creditors of an intended suspension of payment stated by the debtor giving it to be "without prejudice," can be given in evidence on a bankruptcy petition (*In re Daintree*, [1893] 2 Q. B. 116). In the case last cited, Williams, J., said no document which in its nature may prejudice the person to whom it is addressed if the offer it contains is rejected, can be prevented from being put in evidence.

**Prejudice of Purchaser.**—See ADULTERATION.

**Prejudice, Without.**—See PREJUDICE.

**Prelector**—A reader or lecturer. In the cathedral of Hereford, one of the prebendaries is elected to the office of prelector, to hold it till he succeeds to a residentiary canonry, for which he is statutably considered to have a claim to be a candidate. His duty is to preach on Tuesdays, or else on any holy day which may occur during the week for a considerable portion of the year (Hook's *Ch. Dict.*).

**Preliminary Accounts.**—By the R. S. C. 1883, Order 55, r. 10, it is no longer obligatory on the Court or a judge to make a judgment or order, whether on summons or otherwise, for the administration of any trust or of the estate of any deceased person, if the questions between the



parties can be properly determined without such judgment or order. Under this it has been held that if an administration action has been rendered necessary solely by the neglect of a trustee to furnish common accounts about which no question of law is raised, then the Court may, instead of making an order for administration, simply direct such common accounts to be taken (*In re Gyhon, Allen v. Taylor*, 1885, 29 Ch. D. 834). But if the denial of the debt involves a question of law, the creditor is entitled to an order for administration (*In re Powers, Lindsell v. Phillips*, 1885, 30 Ch. D. 291). But preliminary accounts and inquiries should not be directed in a creditor's action until debt is established (*Batthyany v. Walford*, 1887, 36 Ch. D. 269, 276). So, again, by Order 55, r. 10 *a*, upon an application for administration or execution of trusts by a creditor or beneficiary under a will, intestacy, or trust-deed where no accounts or insufficient accounts have been rendered, the Court may make an order that the application shall stand over to enable the executors, administrators, or trustees to render proper accounts (cp. *In re Dartnall, Sawyer v. Goddard*, [1895] 1 Ch. 474; *In re Hayter*, 1883, 32 W. R. 26). The costs in such cases will be ordered to be paid by the party in default (*In re Hayter, supra*), though if the plaintiff's solicitor shows undue haste in having recourse to proceedings he may be disallowed costs against his client (*In re Dartnall, Sawyer v. Goddard, supra*).

Preliminary accounts may also be directed under Order 15, r. 1, where a writ of summons has been indorsed for an account and the defendant fails to appear, or, after appearance, fails to satisfy the Court that there is some preliminary question to be tried (cp. *In re Taylor, Turpin v. Pain*, 1890, 44 Ch. D. 128).

**Preliminary Act.**—In actions for damage by collision between vessels, unless the Court or a judge otherwise order, the plaintiff's solicitor must in seven days after beginning the action, and the defendant's solicitor in seven days after appearance, and before any pleading is delivered, file with the registrar a document called a preliminary act, which shall be sealed up, and shall not be opened till ordered by the Court or a judge, and shall state the following particulars:—(a) The names of the vessels colliding, and their masters; (b) the time of collision; (c) the place of collision; (d) the direction and force of the wind; (e) the state of the weather; (f) the state and force of the tide; (g) the course and speed of the vessel when the other was first seen; (h) the lights, if any, carried by her; (i) the distance and bearing of the other ship when first seen; (k) the lights, if any, of the other vessel first seen; (l) whether any lights of the other vessel, except those first seen, came into view before the collision; (m) what measures were taken, and when, to avoid collision; (n) the parts of each vessel first coming in contact (R. S. C. Order 19, r. 28).

The use of preliminary acts began with the Admiralty Court Rules of 1855 (*The Inflexible*, 1856, Swa. Ad. 33); and their object was stated to be "to obtain a statement from the parties of the circumstances *recenti facto*, and to prevent either party shaping his course to meet the case put forward by his opponent" (Dr. Lushington, *The Vortigern*, 1859, Swa. Ad. 518).

Preliminary acts are required only in cases of collisions between ships, e.g. in an action for damages for the death of a seaman, brought against a ship negligently colliding with the ship on board which the seaman was serving (*Webster v. Manchester, Sheffield, and Lincolnshire Rwy. Co.*, 1884, W. N. 1). They have been declared necessary in a case where the owners of cargo in a barge have sued the owners of a ship colliding therewith (*Secre-*



*tary of State for India v. Hewitt*, 1889, 6 Asp. 384); and in a case in the Admiralty Court, where the owner of a barge sued the owners of a tug for damage done to the barge and its cargo by the tug's towing her into collision with another vessel (*The Alexandra*, Butt, J., 6 Asp. 384 n.); but in a previous case of similar circumstances in the Queen's Bench, the Court refused to order preliminary acts to be filed (*Armstrong v. Gaselee*, 1889, 6 Asp. 353). Preliminary acts have been held unnecessary in a case where the owner of cargo damaged by collision sued the ship carrying the cargo, on the ground that the collision was caused by its negligence (*The John Boyne*, 1877, 3 Asp. 341); for "mutuality is essential to their use" (Sir R. Phillimore, *ibid.*).

The rule for filing preliminary acts extends to all Divisions of the High Court (*Secretary of State for India v. Hewitt*, above). They must be filled up accurately, or their costs may be disallowed (Williams and Bruce, *Admiralty Practice*, 367). Thus it is not a sufficient description of "the distance and bearing of the other ship when first seen" to say she is "at anchor" (*The Godiva*, 1886, 11 P. D. 20). A party may not contradict his preliminary act at the hearing, or amend a mistake in it before the hearing (*The Miranda*, 1881, 7 P. D. 185). In a collision action, where the plaintiff's vessel was lost with all the crew who could give evidence as to the collision, the plaintiffs were allowed, before filing a statement of claim, to administer interrogatories to the defendants as to the circumstances of the collision, including information given in their preliminary act (*The Isle of Cyprus*, 1890, 6 Asp. 534). The cause may be heard on the preliminary acts alone, without pleadings, if the Court so order; but in such a case, if either party wishes to rely upon compulsory pilotage, he must give written notice thereof to the other party within two days from opening the preliminary acts (Order 19, r. 28). For the practice, see Williams and Bruce, *Admiralty Practice*.

**Preliminary Expenses.**—In company formation the preliminary expenses are *prima facie* payable by the party who incurs them (*Skegness and St. Leonards Tramways Co.*, 1888, 41 Ch. D. 215, 241; *Rotherham Alum Co.*, 1883, 25 Ch. D. 103; *In re Empress Engineering Co.*, 1880, 16 Ch. D. 125; *Melhado v. Porto Alegre Rwy. Co.*, 1874, L. R. 9 C. P. 503; *Shrewsbury v. North Staffordshire Rwy. Co.*, 1865, L. R. 1 Eq. 593; *Wyatt v. Metropolitan Board of Works*, 1862, 11 C. B. N. S. 744). The reason is that there is no privity of contract between the person doing the work and the company, even though the articles contain a clause similar to that in the regulations for the management of companies contained in Sched. I. Table A. of the Companies Act, 1862, 25 & 26 Vict. c. 89 (*Melhado v. Porto Alegre Rwy. Co.*, *supra*), for such a clause only governs work done directly for the company (*Skegness and St. Leonards Tramways Co.*, *supra*; *Wyatt v. Metropolitan Board of Works*, *supra*). The company may, however, expressly adopt the agreement of the promoter, and in that case it will be possible to sue it (*Touche v. Metropolitan Rwy. Warehousing Co.*, 1871, L. R. 6 Ch. 671), unless it has done what is *ultra vires* (*Shrewsbury v. North Staffordshire Rwy. Co.*, *supra*). And sometimes there may be a good equitable claim against the company so far as it has derived benefit (*In re Hereford and South Wales Waggon Co.*, 1876, 2 Ch. D. 621). Solicitors' expenses for getting a bill through Parliament are promotion expenses (*In re Brompton and Longtown Rwy. Co.*, 1870, L. R. 10 Eq. 613); but even where the special Act of a company authorises the payment of the costs of



and incident to the passing of its Act, that will not include the payment of work done for the promoters (*In re Kent Tramways Co.*, 1879, 12 Ch. D. 312). If a public body incurs preliminary expenses in connection with works that are not carried out, these will, if *intra vires*, be payable out of a rate levied on the occupiers (*Griffiths v. Longdon Drainage Board*, 1871, L. R. 6 Q. B. 738).

Sometimes a clause in articles of association providing for the company paying the expenses of its promotion may be rejected as fraudulent (*In re Eskern Slate and Slab Quarries Co.*, 1877, 37 L. T. 222), and money paid under such a clause may have to be replaced (*In re London and Provincial Starch Co.*, 1869, 20 L. T. 390; but see *In re The Masons Hall Tavern Co.*, 1869, 21 L. T. 221). In the latter event the directors will be held jointly and severally liable for the money wrongfully expended (*In re Carriage Co-operative Association*, 1884, 27 Ch. D. 322; *In re Englefield Colliery Co.*, 1877, 8 Ch. D. 388). So if a director has misappropriated the company's money, he cannot afterwards set off a debt for preliminary expenses against his liability for the misappropriation (*In re Anglo-French Co-operative Society, Ex parte Pelly*, 1882, 21 Ch. D. 492). But directors can, of course, always get back advances properly made for the company by way of preliminary expenses (*In re Carriage Co-operative Association, supra*).

**Premier; Prime Minister.**—See CABINET.

**Premises, Dangerous.**—1. Where buildings are in such a state as to be likely to endanger public safety, they are dealt with (a) in London under the London Building Act, 1894; (b) elsewhere, under secs. 75–78 of the Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), which is applied by the Public Health Act, 1875, to all urban sanitary districts and to those rural districts to the councils whereof urban powers have been given.

(a) In London, where any structure, including any building, wall, or other structure, and anything affixed to or projecting from a building, wall, or other structure, is in a dangerous state, it is surveyed by a district surveyor, or other competent surveyor, selected by the County Council or the superintending architect as its delegate (*L. C. C. v. Hobbs*, 1896, 61 J. P. 85; 57 & 58 Vict. c. ccxiii. ss. 102–104). If after entry and survey he certifies the structure as dangerous, a notice must be served on the owner or occupier by name, if it is known or can be discovered by reasonable inquiry (ss. 105, 106; *R. v. Mead*, [1898] 1 Q. B. 110). If the notice is properly served, and the person served fails to comply with it as speedily as the nature of the case permits, the council or architect obtains from a Court of summary jurisdiction an order on him, and if it is not obeyed may enter and do what is necessary for safety (s. 107). The owner or occupier, if he disputes the necessity of the work required, may submit the dispute to arbitration; but the currency of an arbitration does not preclude justices from ordering immediate demolition or shoring, if the state of the structure requires it. If the structure is dangerous to its inmates, the Court may order their removal by the police and reception into the workhouse.

A structure may be treated as dangerous even where the danger is not to the public (*L. C. C. v. Herring*, [1894] 2 Q. B. 522).

The certifying surveyor is entitled to a fee for his services (s. 113), and



the council is entitled to recover from the owner of the structure all costs of obtaining an order or carrying it out where the proper procedure has been followed. These are recoverable if the owner does not pay (1) by selling the structure and appropriating the price so far as necessary to recoup the council, or, if it is insufficient, by keeping the site vacant till payment in full; or (2) by recovering the cost before a Court of summary jurisdiction (s. 112). The owner has a remedy over against tenants under repairing leases (see *Lister v. Lane*, [1893] 2 Q. B. 212).

Where the dangerous structure is a party structure, the ordinary regulations as to interference with such structures are dispensed with (s. 90).

In the city of London these provisions are enforced by the corporation as successors to the Commissioners of Sewers (s. 104). See LONDON CITY.

(b) The provisions of the Towns Improvement Clauses Act, 1847, are very similar in character except that the district council may post their notice on the premises if the owner is not known and resident within the district, and may act in case of default without resort to justices. The expenses are recoverable by distress, if the owner is within the district, and, if he is not, they may take the site under the Lands Clauses Act and sell the materials (ss. 77, 78).

These provisions represent the public remedies as to dangerous structures, but do not preclude indictment for nuisance or even manslaughter, where the buildings fall into the street or cause injury to passengers.

As to projections from premises over streets, see HANGING SIGNS.

2. Where injury is caused to any passenger in a street by a dangerous structure, the occupier is liable (*Tarry v. Ashton*, 1876, 1 Q. B. D. 314; *Bower v. Peate*, 1876, 1 Q. B. D. 321). Where the premises are let, the owner is, as a general rule, not liable to the public (*Pretty v. Bickmore*, 1873, L. R. 8 C. P. 401; *Todd v. Flight*, 1861, 9 C. B. N. S. 377; *Gwinnell v. Eamer*, 1875, L. R. 10 C. P. 658). But such liability has been held to exist where a common stair in a building let in flats was dangerous (*Miller v. Hancock*, [1893] 2 Q. B. 177). As between landlord and tenant, the landlord is in no way responsible to the tenant for the dangerous condition of the premises, unless he has expressly contracted to be so, except in the following cases:—

(i.) Where the house is let furnished (*Wilson v. Finch Hatton*, 1877, 2 Ex. D. 336);

(ii.) Where the premises let are let to the working classes under sec. 75 of the Housing of the Working Classes Act, 1890 (see Beven, *Negligence*, 2nd ed., 492); and the liability in the latter cases is confined usually to a warranty that the premises are habitable at the beginning of the tenancy (*Bowen v. Anderson*, [1894] 1 Q. B. 164).

**Premium**—A consideration; something given to invite a loan or bargain; as the annual payment upon insurances; a fee paid for the privilege of being taught a trade or profession; the consideration paid to the assignor by the assignee of a lease, or to the transferor by the transferee of shares or stock, etc. In stockbroking, the value above the original cost or price, as of shares or stock, as opposed to discount, which is the value below the original cost.

**Premunire.**—See PRÆMUNIRE.



**Prerogative.**

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*Introductory.*—Blackstone has defined the prerogative as “a special pre-eminence which the king hath over and above all other persons and out of the course of the common law in right of his royal dignity.” The prerogative is out of the course of the common law only in so far as it confers upon the Crown rights and powers not possessed by the subject. Cowell, from whom Blackstone borrowed the wording of his definition, in his *Interpreter* had erroneously defined it “as above the ordinary course of the common law,” whereas it is only part of the ordinary law. Consequently, if an act done under colour of prerogative is brought in question before the Courts, it is competent for them to say whether the Crown has exceeded its legal powers, and if so, to afford redress. The prerogative is part of the common law, and not the creation of statute; its origins are to be sought in the tribal chieftaincy of the early kings, in the feudal lordship of Norman times, and in legal theory. It is subject to the supreme legislative power of the Crown in Parliament. The historic contests between the Crown and Parliament resulted in the legal restrictions on the prerogative which are to be found in such measures as the Petition of Right, the Bill of Rights, the Act of Settlement, etc.; and in more recent times the peaceful action of the Legislature has in many cases curtailed and regulated it, or superseded the necessity for its exercise. Even so there remain in the books a large number of prerogative powers, which, though never formally repealed, are now never exercised. Laws in England are not abrogated by desuetude, but the revival of disused prerogatives would be regarded with great jealousy. In the *Wensleydale Peerage* case, while it was denied that the Crown had ever created peers for life, it was further contended that, as admittedly no such creations had been made for four hundred years, they would now be unconstitutional (1856, 8 St. Tri. N. S. 479, at p. 487). The executive powers of the Crown at common law constitute the most important part of the prerogative. In this sense Dicey has defined the prerogative as the residue of discretionary power left at any time in the hands of the Crown. The legal and conventional or customary restraints under which this discretionary authority, whether prerogative or statutory, is exercised, have been discussed under CABINET and EXECUTIVE GOVERNMENT. Though the assent of Parliament is not required for the exercise of such authority, the House of Commons by its control of ministers can make its wishes felt, whereas the House of Lords can only interpose effectually when statutory authority is sought for. In this sense the existence of the prerogative has been said to increase the authority of the House of Commons.

*Attributes of the Sovereign.*—Attributes largely the creation of legal theory with which the Crown is by law invested, must first be dealt with. Blackstone mentions sovereignty as the first of these, meaning that the Crown of England is imperial, not subject to pope or emperor. Sovereignty, in the sense of supreme legislative power, is shared by the Crown with



Parliament; but many rights of sovereignty, *jura regalia*, such as the right to make war, peace, and treaties, etc., are still legally in the Crown alone. Another attribute is perpetuity, represented by the maxim "the king never dies." The king is a corporation sole, and on the death of one sovereign, the Crown descends at once to his successor, so that there may be no intermission in the exercise of its authority. See DEMISE OF THE CROWN. For similar reasons the sovereign has no minority, but is always, in doctrine of law, of full age, though, when he is actually a minor, it has been usual to make provision for a regency (*q.v.*). The maxim that the king can do no wrong, and is incapable even of thinking wrong, means that the king cannot be made amenable in the Courts (see PETITION OF RIGHT), and if he make an improper grant, he must be supposed to have been deceived in it. *Nullum tempus occurrit regi*; the king is not barred by prescription, but this rule has been modified by statute (see vol. ix. p. 244). In the king is no corruption of blood; if a person under attainder succeed to the throne, the attainder is forthwith purged. The king is present in every Court; therefore he can never be nonsuited, nor need he appear by attorney. The Crown at common law could neither be awarded costs, nor ordered to pay them; but this rule has also been largely modified by statute. Crown property is exempt from imperial and local taxation (see ROYAL PALACES). This exemption does not extend to the private property which the Crown is authorised to possess; as to which, see 39 & 40 Geo. III. c. 88; 25 & 26 Vict. c. 37; 36 & 37 Vict. c. 61. According to an opinion of the judges, 1716, the king is entitled to the guardianship of his grandchildren in the line of succession, and his consent was required to Royal marriages. This matter is now regulated by the Royal Marriage Act (see ROYAL MARRIAGES).

*Allegiance and Aliens.*—The Crown is older than the modern idea of the State, which it largely represents in law. Thus the duty of allegiance is regarded as due to the person of the sovereign, and until the Naturalisation Act, was inalienable (see ALLEGIANCE). It is said that the oath of allegiance may be tendered to everyone in the Court at the sheriff's tourn. It is also laid down that the Crown is entitled to the service of all its subjects in resisting invasion, repressing rebellion, and in the maintenance of the peace; and, further, that everyone called upon to perform a public duty, if he refuses, is liable to fine. In certain cases the Crown may grant an exemption from service, as in the case of sheriffs, but the Crown cannot exempt a member returned to the House of Commons from serving. The king is also said to have the power of restraining his subjects from passing beyond the seas by writ of *ne exeat regno* (*q.v.*); but this is now only issued by the Courts in legal proceedings. It is also said that he may also recall his subjects from beyond the seas, and for disobedience, seize their lands until they return, when they become liable to a fine; but such powers are now virtually obsolete. The Crown is also entitled to a local allegiance from aliens whilst they are within its dominions. In spite of ancient dicta, it is now settled that the Crown has no right to expel aliens from the United Kingdom, but recourse must be had to Parliament for authority. The Crown cannot naturalise aliens in a constitutional sense, except under statutory authority; but it may do so from the point of view of international law, by making them denizens (*q.v.*).

*Foreign Affairs.*—In foreign affairs the Crown represents the State. What is done by the Crown is the act of the whole nation. Accordingly the Crown accredits and receives ambassadors, negotiates and concludes treaties, makes peace and war. The limits of the treaty-making power will be discussed under TREATIES. The Crown also grants recognition to foreign



States, and when such questions arise incidentally in an action the Court will ascertain the facts as to such recognition, etc., from the ministers of the Crown (*Mighell v. The Sultan of Johore*, [1894] 1 Q. B. 149).

*Naval and Military Forces.*—The command of the naval and military forces, and of all forts and places of strength for the defence of the realm, is vested in the Crown. This is subject to the restriction in the Bill of Rights against maintaining a standing army in time of peace without consent of Parliament. The Secretary of State for War is responsible for the exercise of the Royal prerogative with regard to the government of the army. To this prerogative belongs the now obsolete right of impressing seafaring men for the defence of the realm. See IMPRESSMENT, and generally ARMY and NAVY. The prerogative right to govern the army by Articles of War in time of war is now superseded by statutory authority.

*War.*—In time of war the Crown is entitled at common law to Naval Prize (see PRIZE) and Booty (*q.v.*). It may also authorise the issue of letters of marque to privateers (see PRIVATEERING), but this right has been renounced as regards the signatories of the Treaty of Paris. It may proclaim or authorise a BLOCKADE, may lay an embargo on all shipping, which would prevent anyone from leaving the realm. It may also grant safe conducts. And it may relax the rules against trading with the enemy, either generally by Order in Council, or by the issue of licences in individual cases.

*Church.*—As to the relation of the Crown to the Church of England, see article CHURCH OF ENGLAND.

*Parliament.*—The Crown is a constituent part of Parliament (*q.v.*).

*Justice.*—The Crown is also the fountain of justice. Justice is administered in the name of the Crown, and by judges appointed by it. The jurisdiction of most of the Courts now rests on a statutory basis; the commissions of oyer and terminer and of gaol delivery at the assizes, and the commission of the peace under which justices sit at Quarter Sessions, are instances of the delegation of judicial powers by the Crown. It was laid down that the Crown could not alter the constitution of existing Courts, but might erect new Courts to proceed according to the course of the common law, but not according to another system, such as civil law or equity. The Crown would not now erect a new Court except in pursuance of statutory authority. The criminal law is also administered in the name of the sovereign (see CRIMINAL LAW). And it is in the same capacity that the Crown possesses the right to pardon (*q.v.*).

*Honour, Office, Privilege.*—The Crown is also the fountain of honour and office (see OFFICE), and as such grants titles of honour and precedence, subject to the provisions of the Statute of Precedency. As to whether the Crown can enforce a peerage on anyone against his will, see *Egerton v. Brownlow*, 1853, 4 H. L. 1; 8 St. Tri. N. S. 193. The Crown may grant the title of baron for life, but cannot create a baron for life with a seat in Parliament (*The Wensleydale Peerage*, 1856, 8 St. Tri. N. S. 479). Hereditary peerages granted by the Crown must be descendible according to a course known to the common law (*The Buckhurst Peerage*, 1876, 2 App. Cas. 1).

*Franchises.*—The Crown may also delegate certain parts of the prerogative by granting franchises, described as Royal powers in the hands of the subject (see FRANCHISE), and may erect corporations and universities (*q.v.*).

*Commerce.*—As arbiter of commerce the Crown had the right of appointing ports and havens, and the property in them is *prima facie* vested in it, subject to the rights of public user, also of erecting beacons



and lighthouses; but these matters are now regulated by statute. In 1766 it was settled after some controversy that the Crown had no right to restrain importation or exportation of merchandise, by laying embargoes at the ports in time of peace.

The grant of letters patent for inventions is a prerogative right which has been regulated by statute (see PATENTS).

Here may be mentioned the curious prerogative of prerogative copyright which the Crown possesses as to printing the Bible and Book of Common Prayer, and also possibly Acts of Parliament and other Acts of State, though the latter is not now insisted on (see COPYRIGHT; and *Manners v. King's Printer*, 1826, 2 St. Tri. N. S. 215; and Bacon, *Abr.* "Prerogative" (F.) 5, 7th ed.).

The prerogative also included the exclusive right of creating markets and fairs (*q.v.*), regulating weights and measures (*q.v.*), and coining money (see MINT); but these matters are now mainly regulated by statute.

As *parens patriæ*, the king has the superintendence over infants, lunatics, and idiots (see LUNACY), which is exercised through the Court of Chancery. In the same way the Crown has the superintendence of all charities, from which is derived the power of the Attorney-General, at the relation of some informant to file *ex officio* informations, to have the charity properly established (see CHARITIES, etc.).

*Land, etc.*—All land in England is held either mediately or immediately of the Crown. The Crown is the owner of the soil covered by the narrow seas adjoining the English coast, and by the arms of the sea or navigable rivers, and also *prima facie* owner of the shore, *i.e.* the land between high and low water mark in ordinary tides. The prerogative rights of the Crown also include rights to escheats, *bona vacantia*, forests, certain rights as to mines, fish, and fisheries, waifs, wrecks, estrays, treasure trove (*q.v.*). The prerogative of the Crown is not taken away by statute except by express words. See STATUTE; as to the construction of Royal grants, see GRANT.

*Prerogative Procedure.*—Special remedies are available to the Crown in enforcing its rights against the subject, and the subject must have recourse to special remedies to enforce rights of property against the Crown. The old law on this subject will be found in Chitty on the *Prerogative* and Cruise's *Digest*. For the numerous statutory modifications, see the Index to the Statutes; CROWN DEBTS; and Statutory Rules and Orders, Revised, vol. ii. p. 611. This branch of the prerogative is here dealt with under separate headings (see CROWN DEBTS; DISTRESS; ESCHEAT; EXTENT; INFORMATIONS; OFFICE (INQUEST OF); INTRUSION; MANDAMUS; PETITION OF RIGHT; QUO WARRANTO; TRAVERSE; etc.).

*The Prerogative in British Possessions.*—It remains to consider the effect of the prerogative in the Queen's dominions outside the United Kingdom. The Crown may annex territory to the empire. In *A.-G. for Honduras v. Bristowe*, 1880, 6 App. Cas. 143, it was held that the fact of the Crown making grants of land was evidence of the assumption of territorial sovereignty, although no formal annexation was made for many years after. It may also cede British territory in time of peace, though this has been doubted, apparently on insufficient grounds. In the recent case of Heligoland, parliamentary authority was taken. Where it is desired to annex territory to a colony possessing representative institutions, the recent practice has been for the local legislature to pass an Act making provision for the incorporation of the new territory in the colony. The question whether the Crown by prerogative could sever a colony possessing repre-



sentative institutions, was discussed in the case of *The Island of Cape Breton*, 1846, 6 St. Tri. 283. In recent instances this has been effected by statutory authority. Territorial and sovereign rights acquired by British subjects outside the Queen's dominions enure for the benefit of the Crown, if it choose to take advantage of them; otherwise they have no international force. This doctrine was enforced in the course of the Australasian settlement, and in the case of the Boer trekkers from Cape Colony, though the independence of the latter was afterwards recognised.

As to the extent to which the prerogative attaches in British possessions abroad, a distinction must be made between settled and conquered or ceded colonies. All the lands in settled colonies vest in the Crown, and can only be held under grant from the Crown, usually by socage tenure. They are liable to escheat and other similar prerogatives. In the case of colonies possessing responsible government, the Crown lands and land revenues have been transferred to the Colonial Governments (see 15 & 16 Vict. c. 39; and see *A.-G. of Ontario v. Mercer*, 1882, 8 App. Cas. 767). The Crown might erect Courts of justice to administer the common law, but apparently not Courts of equity; it could also confer a constitution on the colony by commission and instructions to the governor, constituting a governor, council, and general assembly to make laws for the colony. Newfoundland and Barbadoes still possess such constitutions, but most of the colonial constitutions are now founded on imperial or local statutes. In general, it may be said that the prerogatives of the Crown attach upon a settled colony as part of the common law. The exercise of the executive prerogatives of the Crown is in large measure delegated to the governor by the terms of his commission (see COLONY). The Crown has now statutory powers over new settled colonies by the British Settlements Act, 1887.

The Crown may legislate for ceded and conquered colonies until it has granted them a legislature of their own, and may therefore apply such parts of the prerogative as it may think fit. In the *Mayor of Lyons v. The East India Company*, 1837, 3 St. Tri. 647, it was held that the general introduction of English law into a conquered or ceded colony by acts of the sovereign did not draw with it laws manifestly inapplicable to the circumstances of the settlement, and that the then prerogative right of the Crown to the lands of deceased aliens had not been introduced into India as a necessary incident of the acquisition of sovereignty by the Crown.

[*Authorities*.—Chitty, *Prerogative*; Bowyer, *Commentaries*; Forsyth, *Cases and Opinions*; Anson; Lefroy, *Legislative Power in Canada*.]

**Prerogative Court.**—This was the Court of the Archbishop of Canterbury, “wherein all testaments are proved and administrations granted, where the party dying within the province hath *bona notabilia* in some other diocese than where he dieth; and is so called from the archbishop having a prerogative through the whole province for the said purposes; and from this Court an appeal lieth to the King in Chancery” (Burn, *Eccles. Law, Prerogative Court*). The jurisdiction of the Court was transferred to the Probate Court in 1857 by the Probate Court Act, which provided that the voluntary and contentious jurisdiction and authority of all ecclesiastical, royal peculiar, peculiar, manorial, and other Courts and persons in England having at the passing of the Act jurisdiction to grant or revoke probate of wills or letters of administration of effects of deceased persons should cease, and no such Court or person shall exercise such



jurisdiction; and that the Probate Court should have the same powers, and its grants and orders should have the same effect throughout England, and in relation to personal estate in all parts of England of deceased persons as the Prerogative Court of the Archbishop of Canterbury and its grants and orders have now in the province of Canterbury, and the duties of ordinaries in the Prerogative Court in respect of probates, administrations, and matters or causes testamentary within their respective jurisdictions pass to the Probate Court; and the registrars of the principal registry have the same power with reference to proceedings in the Probate Court as the surrogates of the judge of the Prerogative Court could have exercised in chambers with reference to proceedings in the Prerogative Court. By the Judicature Act of 1875 the Court of Probate was merged in the High Court.

**Prerogative Writs.**—The common law of England regards the king as the source or fountain of justice (see PREROGATIVE), and certain ancient remedial processes of an extraordinary nature have from the earliest times issued from the Court of King's Bench, in which the sovereign at an early period presided in person, and in which he was always present in contemplation of law. These extraordinary remedies have been known as prerogative writs, and are issued upon cause shown in cases where the ordinary legal remedies are inapplicable or inadequate. The prerogative writs in present use are the writs of HABEAS CORPUS; MANDAMUS; PROHIBITION; CERTIORARI; PROCEDENDO. Among those formerly in use were the writs of QUO WARRANTO and NE EXEAT REGNO.

In the words of Lord Mansfield: "Writs not ministerially directed—sometimes called prerogative writs, because they are supposed to issue on the part of the king, such as writs of *mandamus*, *prohibition*, *habeas corpus*, *certiorari*—upon a proper case, may issue to every dominion of the Crown," including Ireland, Berwick, the Isle of Man, the Channel Islands, and the colonies, but not to Scotland (see *R. v. Cowle*, 1759, 2 Burr. p. 855). This wide common law jurisdiction has, however, to some extent been restricted and regulated by statute; for example, the writ of *habeas corpus* is not now issued to any British colony having a competent judicature of its own (see Habeas Corpus Act, 1862, 25 & 26 Vict. c. 20).

The Court of King's Bench retained all the jurisdiction of the *Curia regis* in so far as it was not distributed among the other Courts; and this jurisdiction, including the granting of the prerogative remedies, is now, under the provisions of the Judicature Acts, vested in the High Court of Justice.

It may be useful here to indicate very briefly the nature and object of the various prerogative remedies which are used in modern practice.

Of the prerogative writs the writ of *habeas corpus ad subjiciendum* is the best known. It is the most important in its objects, protecting the right of personal liberty and providing a remedy for its violation, and is characteristic of the English common law and the English constitution, enabling as it does the Courts to supervise the action of the executive, and to afford an efficient security for the liberty of the subject. The writ of *habeas corpus* is a prerogative writ by which the king has a right to inquire the causes for which any of his subjects are deprived of their liberty; it is a writ of right, though not of course, for it is not granted except upon cause shown, but it is grantable *ex debito justitiæ* (see per Lord Mansfield, C.J., *R. v. Cowle*, 1759, 2 Burr. at p. 855; per Lord Eldon, *Crowley's case*, 1818, 2 Swans. at pp. 48, 61; *Hobhouse's case*, 1820, 3 Barn. & Ald. 420; see also the article HABEAS CORPUS).



A *mandamus*, said Lord Mansfield, C.J., in a judgment in the Court of King's Bench, is certainly a prerogative writ flowing from the king himself sitting in this Court, superintending the police, and preserving the peace of this country, and will be granted wherever a man is entitled to an office or a function, and there is no other adequate legal remedy for it (*R. v. Barker*, 1762, 1 Black. W. at p. 352). And in a more recent case it was pointed out that a writ of *mandamus* is a prerogative writ, and not a writ of right, and it is in this sense in the discretion of the Court whether it shall be granted or not (per Lord Chelmsford, *R. v. The Churchwardens of All Saints, Wigan*, 1876, 1 App. Cas. (H. L.), at p. 620; see also MANDAMUS).

By the prerogative writ of *prohibition* the assumption of powers by an inferior Court in excess of its jurisdiction is restrained. The writ may issue whenever an inferior Court, whether ecclesiastical or temporal, acts without jurisdiction or in excess of jurisdiction, and requires the proceedings in the inferior Court to be stayed or peremptorily stopped (see Blackstone, *Com.* bk. iii. p. 112; Fitz-Herbert, *Natura Brevium*, p. 40; see also the article PROHIBITION).

The writ of *certiorari* is issued, upon cause shown, to remove civil or criminal proceedings from an inferior Court to the High Court. The Crown is, however, entitled to a writ of *certiorari* as a matter of right and as of course (see Bacon, *Abr.* tit. "Certiorari"; Blackstone, *Com.* bk. iv. p. 315; Fitz-Herbert, *Natura Brevium*, p. 242; see also the article CERTIORARI).

The purpose of the writ of *procedendo* is to compel an inferior Court to proceed to judgment in the case of delay, and also where a cause has been removed from an inferior Court by *habeas corpus* or *certiorari* on insufficient grounds, the proceedings may, by writ of *procedendo*, be sent back to the inferior Court for trial (see Blackstone, *Com.* bk. iii. p. 109; Fitz-Herbert, *Natura Brevium*, p. 153; see also *R. v. Scaife*, 1852, 18 Q. B. 773; and the article PROCEDENDO).

The ancient writ of *Quo warranto* was a high prerogative writ in the nature of a writ of right for the king against one who usurped or claimed any office, franchise, or liberty of the Crown to inquire by what authority he supported his claim in order to determine the right (see High, Extraordinary Legal Remedies (s. 592)). Procedure by information in the nature of a *Quo warranto* has for a long time past taken the place of the ancient writ (see QUO WARRANTO).

The writ of *ne exeat regno* also was a prerogative writ, which formerly issued to restrain a person from leaving the kingdom; in its original use it was confined to political or State purposes (see Bacon, *Abr.* tit. "Prerogative," C. 3; Fitz-Herbert, *Natura Brevium*, p. 85). The writ of *ne exeat regno* was subsequently resorted to in the Court of Chancery. In *Whitehouse v. Partridge*, 1818, 3 Swans. at pp. 378, 379, Lord Eldon, L.C., stated that the application of the high prerogative writ of *ne exeat regno* would not be extended, it having been already extended far enough. Under the present practice the writ is not issued except in cases which come within the provisions of the Debtors Act, 1869, s. 6 (see *Drover v. Beyer*, 1879, 13 Ch. D. 242; see also NE EXEAT REGNO).

The prerogative writs *habeas corpus*, *certiorari*, *prohibition*, *mandamus*, etc., do not issue as of mere course, without showing some probable cause why the extraordinary power of the Crown should be called to the party's assistance (see Blackstone, *Com.* bk. iii. p. 132), and are to be distinguished from original writs which are the commencement of suits between party and party (see, per Lord Mansfield, C.J., *R. v. Cowle*, 1759, 2 Burr. at p. 855).

The term "high prerogative writ" was applied to those writs which



issued at the discretion of the Crown, acting through the Court of King's Bench, in which, in legal theory, the sovereign was personally present, and in some cases through the other superior Courts. The discretion was and is exercised, not arbitrarily, but upon fixed legal principles; and with regard to this, it has been said that upon a prerogative writ there may arise many matters of discretion which may induce the judges to withhold the grant of it, matters connected with delay, or possibly with the conduct of the parties; and when the judges have exercised their discretion in directing that which is in itself lawful to be done, no other Court can question their discretion in so directing; but with regard to that which is in itself not lawful to be done, they are open to correction, as every other Court is, by the Court of Appeal or by a higher authority (see, per Lord Hatherley, *R. v. The Churchwardens of All Saints, Wigan*, 1876, 1 App. Cas. (H. L.), at p. 622).

Further information as to the scope of the prerogative writs and the procedure for obtaining them will be found under their various heads. See CERTIORARI; HABEAS CORPUS; MANDAMUS; QUO WARRANTO; PROCEEDENDO; PROHIBITION.

**Presbyterian.**—See NONCONFORMIST.

**Prescribed.**—Sec. 2 of the Markets and Fairs Act, 1847, provides that “the word ‘prescribed’ used in this Act in reference to any matter herein stated shall be construed to refer to such matter as the same shall be prescribed or provided for in the special Act, and the sentence in which such word occurs shall be construed as if instead of the word ‘prescribed’ the expression ‘prescribed for that purpose in the special Act’ had been used.”

**Prescribed Limits.**—These words in sec. 13 of the Markets Clauses and Fairs Act, 1847, mean the boundaries of the borough to which the local Act relates, and not the limits of the market (*Casswell v. Cook*, 1862, 31 L. J. M. C. 185; see also *Llandaff and Canton Districts Market Co. v. Lyndon*, 1860, 6 Jur. N. S. 1344).

## Prescription.

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#### I. WHAT PRESCRIPTION IS.

When a person acquires a right to an incorporeal hereditament through long user by himself and those under whom he claims, and there is no



known origin of the right, he is said to acquire the right by prescription. Prescription is one of the processes by which lapse of time confers a right. The effect of lapse of time in barring legal rights of action, and in extinguishing rights to real property, depends entirely on the different Statutes of Limitation; these statutes, which have been already discussed (see article LIMITATIONS, STATUTES OF), in so far as they apply to land, act indirectly so as to confer rights, because as a title is only lost by dispossession, the statutes in extinguishing one title to land indirectly confer another; those Statutes of Limitation which do not refer to land have a purely negative effect, and do not confer rights. The Statutes of Limitation do not affect rights to incorporeal hereditaments, except those tithes which do not belong to a spiritual or eleemosynary corporation sole, and hereditaments, like rent and annuities, charged upon land. The effect of the lapse of time in conferring rights to incorporeal hereditaments depends upon prescription, of which there are two kinds,—prescription at the common law and prescription under the Prescription Act,—prescription differing from limitation in this respect, that while there is no limitation except what is laid down by statute, only a part of the subject-matter of prescription is governed by statute.

## II. PRESCRIPTION AT COMMON LAW.

(a) *What Rights may be acquired by Prescription.*—Prescription is often loosely used to express the effect of lapse of time in conferring any right or title, but the word, properly used, only applies to the acquisition of a personal right to incorporeal hereditaments. A title to land may be acquired by the operation of a Statute of Limitation, but cannot be acquired by prescription (*Wilkinson v. Proud*, 1843, 11 Mee. & W. 33). All cases of prescription at common law imply a grant, and therefore no right can be acquired by prescription except a right which can be the subject of a grant. Thus a right claimed by an owner of land to an uninterrupted flow of air (*Bryant v. Lefever*, 1879, 4 C. P. D. 172), or to an uninterrupted prospect (*A.-G. v. Doughty*, 1752, 2 Ves. Sen. 453) over adjacent property, or to the flow of underground water (*Chasemore v. Richards*, 1859, 7 H. L. 349), cannot be the subject of a grant, and cannot be acquired by prescription. So prescription cannot confer a right which is against the public benefit, *e.g.* a right to obstruct a highway (*James v. Hayward*, 1631, Sir W. Jones, 222), or to do anything else which is a public nuisance, or to do something which is against the common law or a statute; a prescription, too, in order to be good, must be certain (Com. Dig. "Prescription," 97), and reasonable (see *Bryant v. Foot*, 1868, L. R. 3 Q. B. 497), and must not be contrary to another prescription (Vin. Abr. "Prescription," 99). But a claim by prescription is good *prima facie* if it might possibly have a legal commencement (Com. Dig. "Prescription," 95). As to what things can and what cannot be prescribed for, see *Co. Litt.* 114 a; Herbert's *History of the Law of Prescription in England*, 88; Vin. Abr. "Prescription," C. & D.

(b) *Time of Prescription.*—Originally the time necessary to establish a title by prescription was time "whereof the memory of man runneth not to the contrary." By analogy to the period of limitation for a writ of right, the commencement of legal memory was ultimately fixed at 1189, the first year of the reign of Richard I. (*Co. Litt.* 113 a). In practice, an enjoyment as of right for twenty years was regarded as proof of user from the time of the commencement of legal memory, but such proof might be rebutted if it were shown that the right claimed could not possibly have existed from that period; a common mode of defeating such a right was by proving



unity of possession of the dominant and servient tenements since 1189 (per Martin, B., *Mounsey v. Ismay*, 1865, 34 L. J. Ex. 55). To meet such cases the Courts resorted to the fiction of a lost modern grant, and where user for twenty years was proved, juries were directed to find that the right in question had been the subject of a grant, but that the grant was lost. This period of twenty years was fixed by analogy to the period required by the old Statute of Limitations, 21 Jac. I. c. 16 (see *Angus v. Dalton*, 1878, 4 Q. B. D. 162; 6 App. Cas. 740).

(c) *What Persons can acquire Rights by Prescription.*—It is of the essence of the doctrine of prescription that the prescription must be attached to something of a continuing nature. Therefore a prescription must be made either in the name of a person and his ancestors, or of a person and those whose estate he hath, or of a corporation and their predecessors (*Co. Litt.* 113 b).

*Rights in Gross.*—The prescription in the name of a person and his ancestors, or of a corporation and their predecessors, relates to rights in gross; such claims are comparatively rare; but see *Welcome v. Upton*, 1840, 6 Mee. & W. 536, for an instance of the successful assertion of a right of pasturage in gross in the case of an individual, and *Johnson v. Barnes*, 1872, L. R. 7 C. P. 592; 8 C. P. 527, for a similar instance in the case of a corporation. But prescription can't confer no such right on an indeterminate body such as the inhabitants of a place, who are unable to take by grant, and are therefore unable to prescribe. A fleeting body like the inhabitants of a place, may, however, claim by custom certain rights, namely, certain easements over the soil of another, *e.g.* a right of way, or a right to play games in a field, but a right to take a *profit à prendre in alieno solo* cannot be gained by custom, except by copyhold tenants claiming against the lord (*Gateward's case*, 1607, 6 Rep. 59 b; *Blewett v. Tregonning*, 1835, 3 Ad. & E. 554). The difference between custom and prescription is explained in *Co. Litt.* 113 b: a prescription is personal, and can only be made in the name of a person or a corporation; a custom is local, and is "alleged in no person, but within some manor or place."

*Prescription in a que estate.*—The commonest form of prescription is that which is laid in a person and those whose estate he has, which is called a prescription in a *que estate*. No person who has an estate less than an estate in fee can prescribe in a *que estate*, as an estate in fee is the only estate which has a continuance. Enjoyment of a right by a lessor, or by a person having a less right than that of a tenant in fee, could not be evidence of enjoyment from the commencement of legal memory, although it might be evidence of a modern lost grant (see *Bright v. Walker*, 1834, 1 C. M. & R. 211). Tenants at will, or tenants for years, who wish to claim a right by prescription, can only do so by claiming it in the name of the tenant in fee (see Herbert on *Prescription*, p. 70). Copyholders are in a different position: they cannot prescribe against the lord, as they are only tenants at will, but they can claim a *profit à prendre* or other easement by the custom of the manor (*Co. Litt.* 113 b).

(d) *Against what Persons can Rights be acquired.*—A claim by prescription from the commencement of legal memory must bind the fee, or else it will bind nobody (see *Bright v. Walker*, 1834, 1 C. M. & R. 211). It does not appear that anyone but the owner in fee can be bound by prescription in its proper sense; but see Herbert on *Prescription*, 80. At common law prescription did not run against the Crown, but by the 18 Edw. I. *Stat. de Quo War.*, prescription was made to run against the Crown.



(e) *What Kind of Enjoyment is required to Establish a Right by Prescription.*—To establish a right by prescription the enjoyment must be uninterrupted, open, continuous, and peaceable. A user which is neither preventible nor actionable cannot establish a right by prescription. The “consent or the acquiescence of the owner of the servient tenement lies at the root of prescription, and of the fiction of a lost grant, and hence the acts or user, which go to the proof of either the one or the other, must be, in the language of the civil law, *nec vi nec clam nec precario*; for a man cannot, as a general rule, be said to consent to or acquiesce in the acquisition by his neighbour of an easement through an enjoyment of which he has no knowledge, actual or constructive, or which he contests and endeavours to interrupt, or which he temporarily licenses; an enjoyment which a man cannot prevent raises no presumption of consent or acquiescence” (*Sturges v. Bridgman*, 1879, 11 Ch. D. at p. 863).

### III. THE PRESCRIPTION ACT, 1832 (2 & 3 WILL. IV. c. 71).

The Prescription Act is entitled “An Act to shorten the time of prescription in certain cases.” It is supplementary to the common law, does not cover the whole field of prescription, and only applies to some of the rights which could be acquired by common law; doubts have been expressed as to whether the Act applies to rights in gross (see *Welcome v. Upton*, 1840, 6 Mee. & W. 536); it certainly does not apply to *profits à prendre* in gross (*Shuttleworth v. Le Fleming*, 1865, 19 C. B. N. S. 687; 34 L. J. C. P. 309), and the scheme of the Act seems intended to be confined to easements properly so called, *i.e.* to easements exercised by the occupier of a dominant tenement over a servient tenement; see sec. 5, which provides that in pleading under the Act it shall be sufficient to allege the enjoyment of the right “by the occupiers of the tenement *in respect whereof the same is claimed*,” language which is only applicable to the case of a dominant and a servient tenement. As regards the easements to which the Act does apply, it takes away no right already existing, but only gives a new mode of asserting rights which could have been acquired before the Act by common law; such rights may still be claimed both under the Act and under the common law, either by enjoyment from the commencement of legal memory or by virtue of a lost grant (*Aynsley v. Glover*, 1875, L. R. 10 Ch. 283).

The first section of the Act relates to rights of common and other profits or benefits “to be taken or enjoyed from or upon any land” whatever, including the land of the Crown and of the Duchies of Lancaster and Cornwall, and of any ecclesiastical person; matters and things which are specially provided for in the other sections of the Act, and tithes, rent, and services, are excepted from this section. The section only relates to such claims as may be lawfully made at the common law by custom, prescription, or grant; custom as here used is limited to the custom of a manor by which copyholders can claim a *profit à prendre* against their lord, for, as we have already pointed out, no other claim by custom to a *profit à prendre* is valid in law. The section enacts that if any such right of common or other profit or benefit to be taken and enjoyed from or upon any land has been actually taken and enjoyed by any person claiming right thereto without interruption for the full period of thirty years, it shall not be defeated or destroyed by showing only that such right, profit, or benefit was first taken or enjoyed at any time prior to such period of thirty years, but that such claim may be defeated in any other way by which the same was liable to be defeated at the time when the Act was passed; when such right, profit, or benefit has been so taken and enjoyed for the full period of sixty years, the right



shall be deemed absolute and indefeasible, "unless it shall appear that the same was taken and enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing."

To establish a right under this section it is only necessary to show that the benefit claimed has been enjoyed without interruption by the claimant for the required period as of right and not by permission, and that the right claimed is one that could have a legal origin by custom, prescription, or grant, and it is immaterial on what ground the claimant rested his alleged right (*Earl de la Warr v. Miles*, 1881, 17 Ch. D. 535). But the user under the Act must be without interruption, and must be such as could be interrupted by someone capable of resisting the claim, and also it must be of right; if no one could interrupt it, and the enjoyment is not of right, the statute does not apply (*Arkwright v. Gell*, 1839, 5 Mee. & W. 203). The right, to be valid, must be appurtenant to some hereditament, and must be connected with the hereditament and with the enjoyment of it; a right claimed by the owner of one tenement to enter on the close of another and to take away trees generally is bad (*Bailey v. Stevens*, 1862, 31 L. J. C. P. 226). An actual enjoyment in fact for more than the statutory period cannot be an enjoyment as of right, if during such period the person that enjoys the benefit knows that it is only permitted so long as some particular purpose is being served; nor does the Act apply to the owner of a servient tenement who enjoys some benefit from the exercise of the easement by the owner of the dominant tenement; the owner of a servient tenement cannot by such enjoyment acquire any right to compel the owner of the dominant tenement to exercise the easement, for the easement only exists for the benefit of the dominant tenement (*Mason v. Shrewsbury and Hereford Rwy. Co.*, 1871, L. R. 6 Q. B. 578).

The second section of the Act relates to claims "to any way or other easement, or to any watercourse or the use of any water." This section is similar in its terms to the first section, except that the periods of prescription are twenty years for a claim that may be defeated, and forty years for an indefeasible claim; the same principles apply to the second section as to the first. It is not clear what easements, other than rights of way or rights to a watercourse or the use of water, are included within this section. In *Webb v. Bird* (1831, 30 L. J. C. P. 384), in deciding that the section did not apply to a right to the passage of air, Erle, C.J., and Byles, J., expressed an opinion that the words or "other easement" should be construed as something *ejusdem generis* with the right of way; it is clear that the generality of the words must be limited in some way, and must exclude the easements provided for in the first and the third sections of the Act; it has been decided that an easement of light is governed entirely by the third section of the Act, and does not come within the general words of sec. 2 (*Perry v. Eames*, [1891] 1 Ch. 658); Lord Selborne, in *Angus v. Dalton* (1881, 6 App. Cas. at p. 798), gave a wider meaning to the words "other easement," and held that it applied to the right of lateral support which one building acquires by lapse of time from the adjacent soil.

The third section, which only applies to rights of light, is different in its terms from the first two sections. The third section provides that "where the access and use of light to and for any dwelling-house, workshop, or other building shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or



writing." The Crown is not named in this section, and therefore is not bound by its provisions (*Perry v. Eames*, [1891] 1 Ch. 658). The third section differs from the first and second sections in that it does not require that the claim to light should be one that could lawfully be made by custom, prescription, or grant, or that the person enjoying the access of light should have claimed it as a right. The right to light conferred by the statute is therefore one of an entirely new kind (Herbert on *Prescription*, 33).

The fourth section determines how the periods of prescription are to be reckoned. "Each of the respective periods of years hereinbefore mentioned shall be deemed and taken to be the period next before some suit or action wherein the claim or matter to which such period may relate shall have been or shall be brought into question." The section also provides that no act or other matter is to be deemed to be an interruption within the meaning of the statute, "unless the same shall have been or shall be submitted to or acquiesced in for one year after the party interrupted shall have had or shall have notice thereof, and of the persons making or authorising the same to be made."

The fifth section relates to pleading, and provides that where, before the Act, the party claiming could by law allege his right generally, without averring the existence of such right from time immemorial, such general allegation should still be deemed sufficient, and that, when a right is claimed in such a form, evidence might be given to establish a right under the Act; also that, where before the Act it would have been necessary to allege the right to have existed from time immemorial, it should be sufficient to allege the enjoyment thereof as of right by the occupier of the tenement in respect whereof the same is claimed for, and during such of the periods mentioned in the Act as may be applicable to the case, and without claiming in the name or right of the owner of the fee; if the other party intends to rely on any proviso, exception, incapacity, disability, contract, agreement, or other matter not inconsistent with the simple fact of enjoyment, such proviso, etc., must be specially alleged. It is often advisable in claiming a prescription to claim it both under common law and under the Act. Indeed it is everyday practice to plead (1) enjoyment of the right claimed (*a*) for twenty or thirty years, as the case may be, (*b*) for forty or sixty years, (*c*) from time immemorial; (2) lost grant (see *Aynsley v. Glover*, 1875, L. R. 10 Ch. 283).

The sixth section provides that no presumption shall be allowed in favour of any claim on proof of the exercise of the right claimed for any less period of time than the period mentioned in the Act as applicable to such claim.

The seventh section relates to cases of disabilities and tenancies for life, and enacts that the time during which any person, otherwise capable of resisting any claim to any of the matters mentioned, shall have been an infant, idiot, *non compos mentis*, feme covert, or tenant for life, or during which any action or suit shall have been pending and which shall have been diligently prosecuted, until abated by the death of any party or parties thereto, shall be excluded in the computation of the periods mentioned, except where the right or claim is declared by the Act to be absolute and indefeasible. Feme covert should now be excepted from this section, as the effect of the Married Women's Property Act, 1882, is to render married women discover for the purposes of bringing actions (see *Lowe v. Fox*, 1885, 15 Q. B. D. 667; *Weldon v. Neal*, 1884, 51 L. T. 289).

The eighth section relates only to easements mentioned in the second



section, and provides that where any land or water upon, over, or from which any way or watercourse or use of water shall have been enjoyed or derived has been held under any term of life or any term of years exceeding three years from the granting thereof, the time of enjoyment of such way, etc., shall be excluded in the computation of the period of forty years, in case the claim shall within three years after the end of such term be resisted by any person entitled to any reversion expectant on the determination thereof. The effect of this section has been considered in *Bright v. Walker*, 1834, 1 C. M. & R. 211, where it was held that, if land was let on a lease for life, no right of way could be acquired during the pendency of the lease against the owner in fee, and that a user which did not give a valid right against the owner in fee gave no right against the lessee or anyone.

#### IV. HOW MAY PRESCRIPTIVE RIGHTS BE LOST.

Prescriptive rights may be extinguished by Act of Parliament, or by operation of law, or by the act of the owner. A prescriptive right is extinguished by the operation of law when the dominant and servient tenements come into the possession of the same owner in fee (see *James v. Plant*, 1836, 4 Ad. & E. 761). An easement of necessity ceases by operation of law when the necessity ceases (*Holmes v. Goring*, 1824, 2 Bing. 76). A prescriptive right may also be destroyed by such a substantial alteration in the dominant tenement as will create a substantial variance in the mode or extent of the user, and will throw a greater burden on the servient tenement (see *Harvey v. Walters*, 1873, L. R. 8 C. P. 166). But no alteration in the dominant tenement will destroy the easement unless there is such a substantial alteration (*Scott v. Pape*, 1886, 31 Ch. D. 554). A prescriptive right may also be destroyed by express release, or by such an abandonment of the right as would justify a jury in presuming a release (*Lowell v. Smith*, 1857, 3 C. B. N. S. 127).

[*Authorities*.—Gale on *Easements*; Goddard on *Easements*; Herbert's *History of the Law of Prescription in England*.]

**Present.**—A request to a tradesman to show the defendant's house, and the defendant would make him a handsome present, is evidence of a contract to pay a reasonable compensation for the work and labour bestowed in that service (*Jewry v. Busk*, 1814, 5 Taun. 302). But a request by a testator that a handsome gratuity should be given to each of his executors is void for uncertainty (*Jubber v. Jubber*, 1839, 9 Sim. 503).

**Presentation.**—The formal intimation by a patron to the bishop of the person he proposes as incumbent for a vacant benefice.

When the legal owner of an advowson is a trustee, so that the right to select an incumbent is in the *cestui-que trust*, the latter *nominates* his clerk to the patron who *presents* him to the bishop.

When a bishop is himself patron of a benefice there is no presentation, and the act of admission to the benefice is termed *collation*. In the case of a donative no presentation is necessary, as nothing is to be done by the bishop, but the clerk is put in possession by the patron. The following statements have therefore no reference to donatives.

If the patron desires to appoint himself he can do so, though he does not, strictly speaking, *present* himself, but asks the bishop to admit him, and the



bishop is bound to do so (*Walsh v. Bishop of Lincoln*, 1875, L. R. 10 C. P. 518), unless he can allege sufficient cause.

The law on this subject will be greatly altered if the Benefices Bill now before Parliament should become law. It is proposed in this article to give a short account of the existing law, leaving the provisions of the bill, if it becomes law, to be dealt with in the Addenda in vol. xii.

#### I. PRESENTATION BY VARIOUS KINDS OF PATRONS.

1. *Coparceners*.—Apart from agreement, the eldest sister has the right to the first turn, the second sister to the second turn, and so on.

2. *The Crown*.—Upon appointment to an English bishopric (*R. v. Provost of Eton*, 1857, 8 El. & Bl. 610) the Crown has the prerogative right of presenting to the benefices vacated by the new bishop. When there are several persons entitled to patronage rights, such as coparceners, the prerogative presentation does not alter their relative rights at all. The Crown is also entitled to exercise the patronage of a bishop during the vacancy of the See (*Mirehouse v. Rennell*, 1825, 7 Barn. & Cress. 113; 8 Bing. 490; 1 Cl. & Fin. 527).

3. *Executors*.—On the death intestate of a patron, the right to present to a vacant benefice passes to his executors, though the advowson descends to his heir.

4. *Infants*.—An infant, however young, can present or nominate a clerk. The selection of the person to be presented is in the guardian if the infant is patron, or, *semble*, in the trustees if the infant is a *cestui-que trust*.

5. *Joint-Tenants*.—If they are trustees the majority may present, and the bishop may, if he think fit, act on their presentation. If the bishop declines to do so, the minority (having had a fair opportunity of urging their views) may be compelled to join in the formal act of presentation, in order to give effect to the right of the majority (*A.-G. v. Scott*, 1749, Amb. 81; 1 Ves. 413). If, however, joint-tenants (or tenants in common) are beneficially interested, then if they cannot all agree each one is entitled to his chance of the presentation by drawing lots (*Johnstone v. Baber*, 1856, 6 De G., M. & G. 439). It is said that if joint-tenants each present a clerk to the bishop, the bishop may choose which he will.

Joint-tenants who are beneficially entitled may present one of themselves if they think fit.

6. *Lunatics*.—The Lord Chancellor exercises the right of presentation where the patron is a lunatic so found by inquisition. It is the practice under such circumstances to present a member of the lunatic's family.

It is presumed that under the Lunacy Act, 1890, the same rule holds where the person, though insane, has not been so found by inquisition.

7. *Married Woman*.—It is said that the husband of a married woman must join with her in a presentation. The point does not seem to have arisen since the Married Women's Property Act, 1882.

8. *Mortgagee*.—Though the right of presentation is in the mortgagee, he must present the person nominated by the mortgagor if a vacancy occurs at any time before foreclosure.

9. *Papists*.—By 13 Anne, c. 13, s. 1, no papist can present to any benefice, and the universities shall have the right to present instead of him (see *Boyer v. Bishop of Norwich*, [1892] Prob. 41; App. Cas. 417).

10. *Parishioners*.—Where a right of presentation is in parishioners the mode of election is regulated by custom (see *Shaw v. Thompson*, 1876,



3 Ch. D. 233; where the custom had been for the vestry to lay down rules for carrying out the election). The Act 19 & 20 Vict. c. 50 provides for the sale of advowsons vested in, or in trustees for, parishioners, ratepayers, freeholders, or the like.

11. *Patrons having Alternate Turns*.—As already mentioned, a prerogative turn by the Crown does not count. If one patron usurps the other's turn, and the six months (LAPSE) run out, the other has lost his turn, and cannot usurp the next turn by way of retaliation (*Keen v. Denny*, [1894] 3 Ch. 169).

## II. EFFECT OF PRESENTATION.

The bishop is to institute the person presented within twenty-eight days (Canon 95), provided he is fit, *idoneus*. The bishop's power of rejection for unfitness is judicial and must be for definite cause.

The grounds for the bishop's refusal to institute are *Ætas, scientia, mores, et ordo* (see Lindwood, p. 139, ed. 1679).

1. *Ætas and Ordo*.—The person instituted must be in priest's orders (14 Car. II. c. 4, s. 10), that is, of the age of twenty-four. He is usually required to produce his letters of orders and his letters missive or testimonials countersigned by his former bishop, but he cannot be compelled to do so (*Bishop of Exeter v. Marshall*, 1866, L. R. 3 H. L. 17).

2. *Mores*.—Any fact which would be just cause of deprivation, whether on moral grounds or by reason of doctrine or ritual, is a just cause for refusal to institute (*Heywood v. Bishop of Manchester*, 1884, 12 Q. B. D. 404; INCUMBENT).

3. *Scientia*.—The bishop may examine the presentee as to his learning (*semble*, by written question and answer), and if he finds him not sufficiently learned, may reject him on that ground (*Willis v. Bishop of Oxford*, 1877, 2 P. D. 192).

In the Welsh dioceses of St. Asaph, Bangor, Llandaff, and St. Davids, it is specially provided by sec. 104 of the Pluralities Act, 1838, that the bishop may reject a presentee on the ground of his ignorance of Welsh (see *Abergavenny v. Llandaff*, 1888, 20 Q. B. D. 460).

The bishop must, or at any rate should, give notice to the patron of his refusal, and must be prepared to state his reasons with precision, inasmuch as the patron in a QUARE IMPEDIT is entitled to take the verdict of a jury as to whether the grounds alleged for refusal do in fact exist (*Bishop of Exeter v. Marshall*, 1866, L. R. 3 H. L. 17). The remedy of the rejected clerk is by *Duplex querela* in the ecclesiastical Courts; of which the most recent instance is *Boyer v. Bishop of Norwich*, [1892] Prob. 41; App. Cas. 417. It is said that an ecclesiastical patron whose clerk is rejected loses his turn by way of penalty for the improper exercise of his right. An ordinary patron can, however, present a second clerk on the rejection of the first.

A presentation by a lay patron may be revoked at any time before institution (1 Phillimore, 315).

It is not lawful to bargain for any valuable consideration for presenting a particular person (SIMONY).

Under certain circumstances, however, a presentation may be made upon condition that the presentee will resign when called upon (RESIGNATION BONDS).

[*Authorities*.—Phillimore, *Ecclesiastical Law*; Gibson, *Codex*, tit. xxxiii., xxxiv. vol. i. p. 756, ed. 1761; for form of presentation, see 1 Phillimore, 314.]



**Presentment.**—A term applied to an expression of the opinion of a grand jury to the Court for which it is summoned, relating to some matter which appears to the grand jury to be of public concern, based on the local knowledge of the jury.

It may be of two kinds—(1) a presentment of the opinion of the jury in favour of a change in the law, *e.g.* of the imposition of whipping as a punishment for certain offences, or as to the frequency of nuisances or grievances in their district, such as that highways are out of repair (but see now 51 & 52 Vict. c. 41, s. 78 (3)); (2) a specific accusation against a named person for a particular crime made on their own knowledge without calling witnesses before them in accordance with the ordinary procedure as to indictments. The presentment is delivered to the Court by the clerk of the peace; and if the Court is competent to deal with it he puts the presentment into the form of an indictment, and the procedure appropriate to a voluntary indictment is then followed. For the form of a presentment, see Archbold, *Quarter Sessions*, 6th ed., 132, 292. The distinction between presentment and indictment, as may be seen by the form of the latter, is very slight and of modern creation. But voluntary presentments are now very rarely made as to crimes. As to presentments by Commissioners of Sewers, see SEWER.

**Presentment of Bill.**—See *BILLS OF EXCHANGE*, vol. ii. p. 94.

**Presents**—A word in a deed signifying the deed itself, which is expressed by the phrase “these presents.” It is especially used in a deed-poll, which cannot be described as “this indenture.”

**President of the Council.**—See *PRIVY COUNCIL*.

**Pressing Seamen.**—See *IMPRESSMENT*.

**Prest**—A duty which sheriffs formerly had to pay on receiving their tallies for the sums standing due from them in the accounts of the Exchequer. It was abolished by 2 & 3 Edw. VI. c. 4, s. 5 (1548). See *SHERIFF*.

**Prestation Money**—Money payable by archdeacons to bishops in consideration of their exercising a jurisdiction which was formerly the bishops’ (see *Gooche v. Bishop of London*, 1731, 2 Stra. 879. See also *ARCHDEACON*).

**Presumptions.**—Presumptions are of three kinds: (1) conclusive or absolute presumptions of law, or *presumptiones juris et de jure*; (2) rebuttable or *prima facie* presumptions of law, or *presumptiones juris*; and (3) presumptions of fact, or *presumptiones facti* or *natura*.

(1) Conclusive presumptions are inferences which the law will not allow to be contradicted by evidence. Though they are often conveniently



spoken of as presumptions, they are in their nature hardly distinguishable from rules of substantive law. Thus the well-known presumption that every sane person above the age of fourteen knows the law is so wide of the truth, that it is more happily expressed by saying that a man cannot take the benefit of his ignorance of the law (see Austin, *Jurisprudence*, vol. ii. p. 171). Another common law presumption is, that every sane man of the age of discretion is conclusively presumed to intend the natural and probable consequences of his own acts (*R. v. Dixon*, 1814, 3 M. & S. 15; 15 R. R. 381; *R. v. Sheppard*, 1810, Russ. & R. 169). See also AGE, PRESUMPTIONS AS TO.

At common law and by statute there are many conclusive presumptions with regard to the regularity of official documents and proceedings. At common law it is presumed that writs issuing out of the High Court are duly issued and in a case in which the Court has jurisdiction, unless the contrary appears on the face of them. Similarly, it is presumed that warrants and proceedings of either House of Parliament are regular and duly executed (*Gosset v. Howard*, 1847, 10 Q. B. 411). And it is conclusively presumed that the records of the High Court and charters of the Crown have been correctly made (*Reed v. Jackson*, 1801, 1 East, 355; 6 R. R. 283; *Ludford v. Gretton*, 1576, Pl. Com. 490).

Examples of conclusive presumptions created by statute will be found in the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52, s. 48—with regard to fraudulent preferences); the Companies Act, 1862 (25 & 26 Vict. c. 89, ss. 18 and 192—Certificate of Incorporation conclusive evidence of incorporation of company); the Nonconformists Chapels Act, 1844 (7 & 8 Vict. c. 45, s. 2—right to teach certain religious doctrines conclusively presumed from usage); and the Prescription Act (2 & 3 Will. IV. c. 71, ss. 1, 2, and 3—conclusive presumption of lost grant).

Deeds and wills thirty years old, and produced from the proper custody, need not be proved, as there is a conclusive presumption that the attesting witnesses are dead (*Doe v. Walley*, 1828, 8 Barn. & Cress. 22; *Doe v. Burdett*, 1835, 4 Ad. & E. 1, 19).

When a bill of exchange is in the hands of a holder in due course, a valid delivery of the bill by all parties prior to him, so as to make them liable to him, is conclusively presumed (45 & 46 Vict. c. 61, s. 21).

Certain presumptions are absolute, unless rebutted by evidence of a particular kind. Thus an untrue defamatory statement is presumed conclusively to be malicious unless the occasion be shown to be privileged. Evidence of any other kind will not rebut the presumption (per Le Blanc, J., *R. v. Creevey*, 1813, 1 M. & S. 282; 14 R. R. 427; *Clark v. Molyneux*, 1877, 3 Q. B. D. 237). So a certificate of the official receiver in bankruptcy that a composition or scheme has been duly accepted and approved is conclusive as to its validity, unless fraud be proved (53 & 54 Vict. c. 71, s. 3).

(2) Rebuttable presumptions of law are inferences which a jury or a judge of fact is bound to draw from particular evidence, unless and until they are rebutted by evidence or by some other presumptions. This may be illustrated by the presumptions of legitimacy.

*Legitimacy*.—Where husband and wife have cohabited together, and no impotency is proved, a child born of the wife is conclusively presumed to be legitimate (*Cope v. Cope*, 1833, 5 C. & P. 604). But if the husband and wife are living separate, the presumption is rebuttable. In the absence of other evidence, a child will be held legitimate; but if it be shown that there has been no possibility of access, a jury may find that the child is illegitimate (*Bosville v. A.-G.*, 1887, 12 P. D. 177; *Burnaby v. Baillic*, 1889, 42 Ch.



D. 282, 296; *Morris v. Davies*, 1837, 5 Cl. & Fin. 163; *Aylesford Peerage case*, 1886, 11 App. Cas. 1).

*Marriage*.—Where a man and woman are proved to have lived together as man and wife, there is a presumption that they are lawfully married; and where it is proved that a form of marriage has been gone through, it will (except in prosecutions for bigamy and divorce) be presumed that the marriage was validly celebrated (*Piers v. Piers*, 1849, 2 H. L. 331; *Sastry v. Sembecutty*, 1881, 6 App. Cas. 364; *Sichel v. Lambert*, 1864, 15 C. B. N. S. 781; *R. v. Griffin*, 1879, 14 Cox C. C. 308; 24 & 25 Vict. c. 100, s. 57; 20 & 21 Vict. c. 85, s. 33).

*Innocence*.—In civil as well as criminal proceedings every person is presumed innocent of crime till the contrary is proved (see Stephen, *Evidence*, art. 94; *Williams v. East India Co.*, 1802, 3 East, 192; 6 R. R. 589; *Middleton v. Barned*, 1849, 4 Ex. Rep. 241; *R. v. Twynning*, 1819, 2 Barn. & Ald. 386; 20 R. R. 480).

*Married Women*.—If a married woman commits a theft, or receives stolen goods, knowing them to be stolen, in the presence of her husband, she is presumed to have acted under his COERCION. It is uncertain how far this presumption applies to felonies in general. It does not apply to high treason or murder (see Stephen, *Digest of Criminal Law*, art. 30).

*Against Wrong-doers*.—If a man by his own tortious act withhold the evidence by which the nature of his case would be manifested, every presumption to his disadvantage will be adopted—*omnia præsumentur contra spoliatores* (*Armory v. Delamire*, 1721, 1 Stra. 305; 1 S. L. C. 385; *Clunnes v. Pezzey*, 1807, 1 Camp. 8).

Destruction of ship's papers raises a strong presumption that the vessel or her cargo is liable to condemnation. In other European countries it appears that this presumption is conclusive (*The Hunter*, 1814, 1 Dods. Adm. Rep. 480, 486).

Restricted goods seized under the Customs Acts are presumed to be goods liable to, and unshipped without, payment of duty (39 & 40 Vict. c. 36, s. 178; and see *ibid.* s. 180).

If a collision takes place between two vessels, one of which is proved to have been at anchor (*The Bothnia*, 1860, Lush. 52; 29 L. J. P. & M. 65), or in stays (*The Sea Nymph*, 1860, Lush. 23), the other vessel is presumed to be to blame. And if, of two colliding ships, one, without reasonable excuse, fails to render to the other such assistance as may be practicable, that one is presumed to have been to blame for the collision (57 & 58 Vict. c. 60, s. 422; *The Queen*, 1869, 1 L. R. 2 Ad. & Ec. 354; 4 Moo. P. C. C., N. S. 334).

*Omnia præsumentur rite esse acta*.—It is presumed that every person who acts in a public office was duly appointed or authorised to do so (*McGahey v. Alston*, 1836, 2 Mee. & W. 206; *R. v. Roberts*, 1878, 14 Cox C. C. 101), and that the duties of those who fill public offices are performed with regularity (*R. v. Catesby*, 1824, 2 Barn. & Cress. 814; *R. v. Mainwaring*, 1857, 10 Cox C. C. 192). And by statute, a rate which appears by the rate book to have been duly made and allowed, will be presumed to have been duly made and published (32 & 33 Vict. c. 41, s. 18).

*Regularity of Documents*.—It is presumed—

(a) That a lost document was properly stamped (*Marine Investment Co. v. Haviside*, 1872, L. R. 5 H. L. 624).

(b) That a deed signed and attested was duly sealed and delivered (*In re Sandilands*, 1871, L. R. 6 C. P. 411).

(c) That a document was made on the day of which it bears date (*Morgan v. Whitmore*, 1852, 6 Ex. Rep. 716; *Patez v. Gossop*, 1847, 2 Ex.



Rep. 191); and as to bills of exchange, see 45 & 46 Vict. c. 61, s. 13, and *Roberts v. Bethell*, 1852, 12 C. B. 778.

(d) That alterations, erasures, etc., in deeds, affidavits, and other documents, not being wills, were made before execution (*R. v. Gordon*, 1855, Dears. C. C. 586; *Doe de Tatum v. Catomore*, 1851, 16 Q. B. 745).

*Wills*.—There are the following legal presumptions in regard to the execution of wills:—

(a) That papers bound together and constituting the will as found at testator's death, were so bound together at the time of execution and attestation (*Rees v. Rees & Recs*, 1873, L. R. 3 P. & D. 84; *Marsh v. Marsh*, 1860, 1 Sw. & Tr. 528).

(b) That interlineations, alterations, and erasures in wills were made after execution (*Simmons v. Rudall*, 1851, 1 Sim., N. S. 115, 136; *Lushington v. Onslow*, 1848, 6 N. C. 183; *Cooper v. Brockett*, 1846, 4 Moo. P. C. C. 449).

(c) Where a will is shown to have been in the custody of a testator, and it is not found at his death, the presumption is that the testator himself destroyed it (*Sugden v. Lord St. Leonards*, 1876, per Sir J. Hannen, 1 P. D. 195; *Welch v. Phillips*, 1836, 1 Moo. P. C. C. 299; *Keen v. Keen*, 1873, L. R. 3 P. & M. 105).

(d) For presumptions as to the construction of wills, see WILL.

*Bills of Exchange*.—(a) Every party whose signature appears on a bill is presumed to have become a party thereto for value (45 & 46 Vict. c. 61, s. 30).

(b) Every holder is presumed to be a holder in due course. This presumption is lost when it is shown that the bill is affected with fraud; but arises again when it is shown that value has in good faith been given for the bill (*ibid.*).

(c) Indorsements are presumed to have been made in the order in which they stand (*ibid.* s. 52 (5)).

(d) Except where an indorsement bears date after the maturity of the bill, every negotiation is presumed to have been effected before the bill was overdue (*ibid.* s. 36 (4)).

(e) Where a bill is no longer in the possession of a party who has signed it as drawer, acceptor, or endorser, a valid and unconditional delivery by him is presumed (*ibid.* s. 21 (3)).

*Landlord and Tenant*.—Where a tenant holds over after the expiration of his term and pays rent, a new year-to-year tenancy is presumed (*Bishop v. Howard*, 1823, 2 Barn. & Cress. 100; 26 R. R. 291).

*Prescription and Custom*.—*Ex diuturnitate temporis omnia præsumuntur rite esse acta*.—Long and peaceable enjoyment of customs and of franchises and easements raises a presumption of law of a lost grant or other appropriate lawful origin (*R. v. Joliffe*, 1823, 2 Barn. & Cress. 54; *Goodman v. Mayor of Saltash*, 1882, 7 App. Cas. 633; *Dalton v. Angus*, 1881, 6 App. Cas. 740; *Tilbury v. Silva*, 1890, 45 Ch. D. 98); and see PRESCRIPTION; CUSTOM; EASEMENT; HIGHWAYS.

When a custom has been once proved to exist, its continued existence is presumed till the contrary is proved (*Scales v. Key*, 1840, 11 Ad. & E. 819; and see *Pickett v. Packham*, 1869, L. R. 4 Ch. 190, a presumption of fact as to the continuance of a lease).

*Life and Death*.—When a person has been proved to be alive at any time, there is a presumption of fact that he continues to live for some (indefinite) time afterwards (*R. v. Lumley*, 1869, L. R. 1 C. C. R. 196). But when a person goes abroad and is not heard of for seven years by those who



would be likely to hear of him if living, there is a presumption of law that he is dead, but there is no presumption as to the time of his death (*Nepean v. Doe*, 1837, 2 Mee. & W. 894; 2 Sm. L. C. 542; and see 18 & 19 Car. II. c. 11, s. 1, as to absence beyond seas for seven years of a *cestui-que vie*; and 24 & 25 Vict. c. 100, s. 57, as to absence of husband or wife for seven years in cases of bigamy).

*Boundaries and Title.*—(a) Where a road or stream bounds properties or parishes, the middle line of the road or stream is presumed to be the boundary (*R. v. Strand Board of Works*, 1863, 4 B. & S. 526; *Berridge v. Ward*, 1861, 10 C. B. N. S. 400; *R. v. Inhabitants of Landulph*, 1834, 1 Moo. & Rob. 393; *Lord v. Commissioners of Sydney*, 1859, 12 Moo. P. C. 473).

(b) The soil of unnavigable rivers and of highways is presumed to belong to the adjoining owners *usque ad medium filum* (*Carter v. Muscat*, 1768, 4 Burr. 2163; *Crossley v. Lightowler*, 1866, L. R. 3 Eq. 279; *Beckett v. Corporation of Leeds*, 1872, L. R. 7 Ch. 421).

(c) Where two adjacent fields are separated by a hedge and ditch, the hedge is presumed to belong to the owner of the field in which the ditch is not (per Bayley, J., in *Guy v. West*, 1808, Sel. N. P. 1244).

(d) The Crown is presumed to own the foreshore as far as the medium line between high and low water mark (*A.-G. v. Chambers*, 1854, 3 De G., M. & G. 206); above that line, the owner of the adjoining land (*Lowe v. Govett*, 1832, 3 Barn. & Adol. 862).

(e) The wastes of a manor are presumed to belong to the Lord of the Manor (*Doe de Dunraven v. Williams*, 1836, 7 Car. & P. 332).

(f) It is presumed that every enclosure made by a tenant adjoining the demised premises is made for the benefit of his landlord (*ibid.*).

(g) Possession of land is *prima facie* evidence of seisin in fee (*Asher v. Whitlock*, 1865, L. R. 1 Q. B. 1; 11 Ruling Cases, 542).

(3) Presumptions of fact are any inferences which a jury may draw or not, according to the circumstances of the case. They are not rules of law, and a judge ought not to direct a jury that they must draw them. Some of these presumptions are well recognised and of frequent occurrence, and are scarcely distinguishable from presumptions of law. Such is the presumption that a person in possession of recently stolen property stole it, or received it knowing it to have been stolen (*R. v. Langmead*, 1864, L. & C. 427; 9 Cox C. C. 464).

In the Divorce Court adultery is constantly presumed from cohabitation.

For cases in which negligence has been presumed from the mere happening of events which could scarcely have happened without negligence (*res ipsa loquitur*), see *Kearney v. L. B. & S. C. Rwy. Co.*, 1870, 1 L. R. 5 Q. B. 411; *Scott v. London Dock Co.*, 1865, 3 H. & C. 596; *Skinner v. L. B. & S. C. Rwy. Co.*, 1850, 5 Ex. 787.

There is a general presumption of fact, or perhaps of law, in favour of continuance. What is proved to have existed at one time may be presumed to exist for some time after, longer or shorter, according to circumstances. Thus a debt having been proved, it is presumed that it continues till payment or discharge is proved (*Jackson v. Irvin*, 1809, 2 Camp. 50; 11 R. R. 658). Every person is *prima facie* sane, but a man proved to have been insane at one time is presumed to continue so (*Smith v. Tebbitt*, 1868, L. R. 1 P. & D. 398, 434; *Dyce Sombre v. Troup*, 1856, Dea. & Swa. 22, 38, 49; 26 L. T. 288). A person proved to have been alive, is presumed to continue to live for some indefinite time after, unless his death is proved or may be presumed (see above). There is no rule as to when the



presumption of life ceases (see *Doe v. Deakin and Walley*, 1828, 3 Car. & P. 402; 8 Barn. & Cress. 22; *Doe v. Andrews*, 1850, 15 Q. B. 756; *Doe v. Davies*, 1847, 10 Q. B. 314; *Doe v. Michael*, 1851, 17 Q. B. 276; *Manby v. Curtis*, 1815, 1 Price, 225).

[*Authorities*.—Taylor on *Evidence*, pt. i. ch. 5; Wills on *Evidence*, pt. i. ch. 3.]

**Presumptive Heir.**—See HEIR, vol. vi. at p. 165.

**Presumptive Title.**—A barely presumptive title is one of the very lowest order, and arises out of the mere possession or occupation of property, without any other apparent right to have such possession or occupation. There is always a strong presumption in favour of the *jus possessionis* or occupier's right to possess; in fact, proof of the possession of land is *prima facie* evidence of seisin, though a presumption of this kind is always rebuttable by showing facts which raise a contrary and stronger presumption, as, for example, a subsequent adverse possession for forty years (*Jayne v. Price*, 1814, 5 Taun. 326; 15 R. R. 518). So where a vestry had let the grazing on a highway for 115 years, it was held that a lawful origin must be presumed from the long usage, and that the soil of the highway was, in the parish, subject to the public right of way (*Haigh v. West*, [1893] 2 Q. B. 19). And if there has been a conveyance or transfer of the title, but the person to whom it has been conveyed or transferred has neglected for a long time to avail himself of his rights, there may be a presumption of a reconveyance (*Doe d. Rees v. Williams*, 1837, 2 Mee. & W. 749; *Tenny d. Whinnet v. Jones*, 1833, 3 Moo. & S. 472). A similar result may happen when one man disseises another, or where, after the death of a proprietor and before the heir has entered, a stranger takes possession and keeps it to the exclusion of the heir. A possession acquired in this way will enable the occupier to maintain an action for trespass against anyone not able to show a better title, and will by lapse of time ripen into a complete and indefeasible ownership. The old feudal maxim was that seisin must be the basis or starting-point of every title, except in the case of descent, and therefore seisin is presumed from possession, even though no actual title-deeds are forthcoming, so long, that is, as no stronger presumptive title is shown.

**Pretenced Right.**—Pretenced rights or titles arise under the Statute 32 Hen. VIII. (1540), c. 9, s. 2, and comprise either titles for which in fact there is no foundation, that is to say, fictitious titles, or rights or titles which, though not fictitious, were not as the law stood at the date of that enactment capable of being conveyed (*Co. Litt.* 369 a; *Doe d. Williams v. Evans*, 1845, 1 C. B. 724). Before the statute above mentioned the common law was that he who was out of possession might not bargain, grant, or let his right or title, and if he had done it, it should have been void (*Partridge v. Strange and Croker*, 1552, Pl. Com. 77, 88). This doctrine was simply confirmed by the Pretenced Title Statute and a penalty superadded.

Under this Act, buying or selling a pretended title included the buying or selling lands of which the title was known to be in dispute, below the value which they would have had if the title had not been in dispute, and to the intent that the buyer might carry on the suit in place of the seller. So, too, it was immaterial whether the title sold was good or bad (*Goodwin v.*



*Butcher*, 1675, 2 Mod. 67). If the forfeiture was incurred, the whole transaction was void (*Doe d. Williams v. Evans*, *supra*). But where the action was against a *buyer*, it was essential that his knowledge of the fact that the title was only pretended should be established (*Slywright v. Page*, 1587, Golds. 101).

Such was the state of matters down to 1845. In that year the 8 & 9 Vict. c. 106, s. 6, made rights of entry alienable by deed, but the Pretenced Title Act was not repealed (see *Jenkins v. Jones*, 1882, 9 Q. B. D. 128). Since 1845, therefore, a grant of lands to which the grantor has an actual title, though he has never been in possession, is valid; that is, mere non-possession no longer is an essential feature of pretended rights. In an action against a buyer, consequently, the onus is now on the plaintiff to show not only that the title purchased is bad, but also that the buyer knew that it was bad in fact, and the mere fact that the right purchased was barred by the Statute of Limitations at the time of the purchase will not necessarily render the title pretended (*Kennedy v. Lyell*, 1885, 15 Q. B. D. 491).

**Prevarication.**—See WITNESS.

**Preventive Service; Water-Guard.**—See COASTGUARD.

**Previous Conviction.**—It has been the policy of the Legislature since the mitigation of the severe punishments at one time imposed on criminals, to provide for a gradual increase of severity of punishment in the case of habitual offenders.

Persons convicted of felony after a previous conviction of felony, are liable to penal servitude for life, or not less than three years (7 & 8 Geo. IV. c. 28, s. 11). Simple larceny after a previous conviction of felony, whether summarily or on indictment, is punishable by penal servitude from three to ten years (24 & 25 Vict. c. 96, s. 7). Simple larceny, or any offence punishable as such—(1) if committed after conviction of an indictable misdemeanour under the Larceny Act, 1861, is punishable by penal servitude from three to seven years (24 & 25 Vict. c. 96, s. 8); (2) if committed after two summary convictions under 9 Geo. IV. c. 56, or 10 & 11 Vict. c. 82, or the Summary Jurisdiction Act, 1879, or the Larceny or Malicious Damage Acts of 1861, is felony, and punishable by penal servitude from three to seven years. These punishments are all alternative to imprisonment for not over two years, with or without penal servitude; and boys under sixteen may be whipped in addition, or in the alternative.

In the case where a previous conviction of an adult on indictment is proved, any summary jurisdiction which would otherwise attach is taken away (42 & 43 Vict. c. 49, s. 14).

Persons convicted by a jury (*R. v. Blaby*, [1894] 2 Q. B. 170) or on their own confession of an offence against ss. 9–11 of the Coinage Offences Act, 1861, after a previous conviction thereof, are guilty of felony, and liable to penal servitude for life, or not less than three years (24 & 25 Vict. c. 99, s. 12).

To warrant the increased punishment it is necessary in the indictment, after charging the subsequent offence, to state that the accused has been previously convicted of felony or the particular offence. The second charge is not stated to the jury or evidence given on it until the subsequent offence is proved or confessed, unless the accused calls evidence to character



(7 & 8 Geo. IV. c. 28, s. 11; 6 & 7 Will. IV. c. 111; 24 & 25 Vict. c. 96, s. 116; c. 99, s. 37; 34 & 35 Vict. c. 112, s. 9).

The previous conviction is usually proved by a certificate of the conviction, or in the case of a summary conviction by a copy thereof, and the identity of the accused with the person named therein is proved by a warder who had him in custody (7 & 8 Geo. IV. c. 28, s. 11; 14 & 15 Vict. c. 99, s. 13; 34 & 35 Vict. c. 112, s. 18; and see *Arch. Cr. Pl.*, 21st ed., pp. 183, 1125).

In numerous cases offences punishable on summary conviction are subjected by the Act creating them to a severer punishment on a subsequent conviction (see BROTHEL; MALICIOUS DAMAGE). Where on the subsequent conviction a sentence of over three months' imprisonment can be inflicted, the defendant may elect to be tried on indictment (42 & 43 Vict. c. 49, s. 17). Secs. 7, 8 of the Prevention of Crime Act, 1871 (34 & 35 Vict. c. 112), provide for the measures for control and supervision of persons convicted of crime after a previous conviction thereof. By crime here is meant—

- (i.) Felony;
- (ii.) Uttering false or counterfeit coin, or possessing counterfeit gold or silver coins (24 & 25 Vict. c. 99, ss. 9-11);
- (iii.) Obtaining goods or money by false pretences (24 & 25 Vict. c. 96, s. 88);
- (iv.) Conspiracy to defraud;
- (v.) Being armed, with intent to break and enter any house in the night (24 & 25 Vict. c. 96, s. 58).

Where a man is twice convicted of crime as above defined, he is guilty of an offence punishable on summary jurisdiction if within seven years from expiration of a sentence of imprisonment or penal servitude for the second offence; and in the case of release, a licence during the currency of the licence also—

- (1) There are reasonable grounds for holding that he is getting his living dishonestly.
- (2) On being charged with any offence he refuses his name or address, or gives a false name or address.
- (3) He is found in any place under circumstances which satisfy the Court that he was about to commit, and was committing any offence.
- (4) If he is found in a dwelling-house or certain other places without being able to satisfy the Court as to his object in being there.

Provision is made for arrest and summary punishment (34 & 35 Vict. c. 112, s. 7; 54 & 55 Vict. c. 69, s. 6).

Persons twice convicted of crime as above defined, may also be subjected to POLICE SUPERVISION (34 & 35 Vict. c. 112, s. 8; 54 & 55 Vict. c. 69, s. 4; and see PENAL SERVITUDE).

Previous convictions of crime may not be put in evidence on trial for a subsequent offence unless evidence of good character is tendered on behalf of the accused (6 & 7 Will. IV. c. 111). As to evidence of previous conviction on charges of receiving, see RECEIVING.

### **Pricking for Sheriffs.**—See SHERIFF.

**Priest.**—The office of priest is the second order of the ministry in the Catholic Church. A priest in the Church of England at his ordination receives power to give absolution and to preach the Word, and authority to consecrate and administer the holy communion, in the congregation whereto he shall be lawfully appointed. By Canon 36 of the Canons of 1603, he may not preach without a licence under seal from the archbishop of the



province or bishop of the diocese, where he is placed, or from one of the two universities of Oxford or Cambridge under its seals; but induction into a benefice nevertheless gives a right to the incumbent inducted to preach (see further, articles CLERGY; HOLY ORDERS; INCUMBENT).

[*Authorities*.—Watson's *Clergyman's Law*; Phillimore's *Eccl. Law*, 2nd ed.]

**Primæ impressionis.**—See IMPRESSION (FIRST).

**Primage**—This is a charge payable as a gratuity to the master of a ship by a charterer or shipper of goods. “It is called in the old books hat money, and *les contributions des chausses ou pot du vin du maitre*, which clearly refers to a personal collection by the master” (Lord Tenterden, *Best v. Saunders*, 1828, Moo. & M. 208). In a case where, by the bill of lading, goods were to be delivered “on payment of freight with primage and average accustomed,” and the consignee had paid the freight to the shipowner, the master was held entitled to primage, although by the contract (there being no charter-party) between the shipowner and consignee £5 per ton freight was to be paid without any mention of primage, and by the contract between the master and shipowner the former was to receive a sum certain “in lieu of all cabin and other allowances” (*ibid.*); and, similarly, where the master's agreement was for “£10 a month wages, one-third of all passage moneys, and owner to find the cabin,” the master was held entitled to primage (*Charleton v. Cotesworth*, 1829, Ry. & M. 175). Where the defendant chartered the plaintiff's ship, of which the plaintiff was master, and agreed to pay freight and £25 gratuity to the captain before the ship sailed, it was held that in an action for the gratuity the defendant could not set up the master's misconduct as a defence, but must bring a cross action (*Seeger v. Duthie*, 1860, 29 L. J. C. P. 253, 259). This privilege of the master is, however, generally now taken away by the terms of the contract between him and the shipowner; and thus, in a case where a charterer undertook to “ship a full cargo for an English port at a freight of sixty shillings per ton in full, ship paying all port charges, pilotages, and towages,” and master to sign bills of lading, and the master, who was paid a fixed salary, to include all charges and allowances, signed a bill of lading for the whole cargo, making the goods “deliverable to order or assigns, freight to be paid in cash at port of discharge, rate of discharge and freight and other conditions as per contract of payment, with 5 per cent. primage in cash on delivery as customary,” and the assignees received the cargo and paid the freight, the master was not allowed to recover primage from them (*Caughey v. Gordon*, 1878, 3 C. P. D. 419).

**Primary Evidence.**—See EVIDENCE.

**Primate.**—See ARCHBISHOP.

**Primo beneficio**—A writ addressed by the sovereign to the Lord Chancellor or Lord Keeper, directing him to bestow the first vacant benefice in the royal gift, above or below a certain value, upon a certain person.



**Primogeniture.**—See INHERITANCE; REAL PROPERTY, *Descent of*; and cp. BOROUGH ENGLISH; GAVELKIND.

**Prince Consort.**—See SOVEREIGN.

**Prince Edward Island.**—See CANADA.

**Prince of Wales.**—See CORNWALL; WALES.

**Prince of Wales' Island.**—See STRAITS SETTLEMENTS.

**Princes of the Blood.**—See ROYAL FAMILY.

**Princes, Restraint of.**—See PRINCES, RULERS, AND PEOPLES.

**Princes, Rulers, and Peoples.**—"Arrests, restraints, and detainments of princes, rulers, and peoples," or some such phrase, is a common exception to the shipowner's liability in contracts of affreightment, and a peril regularly insured against in the ordinary marine policy.

In either contract the phrase "comprehends every case of interruption to the adventure by lawful authority," including every species of *vis major* which is not covered by a charter-party, king's enemies, and perils of the seas (including pirates) (Byles, J., *Russell v. Niemann*, 1864, 34 L. J. C. P. 10, 14), is a policy having the same effect. It does not include the act of any Court of law or judicial tribunal (*Finlay v. Liverpool & G. W. S. S. Co.*, 1870, 3 M. L. C. 487); but it must be the act of the Government of this country or some friendly Power for State purposes (*Crew, Widgery, & Co. v. G. W. S. S. Co.*, 1887, W. N. 160).

The words extend beyond physical seizure or arrest; they will cover an embargo (*Rotch v. Edie*, 1795, 6 T. R. 413; 3 R. R. 222), a blockade (*Geipel v. Smith*, 1872, L. R. 7 Q. B. 404), a siege (*Rodocanachi v. Elliott*, 1874, L. R. 9 C. P. 518), whether caused by the act of a foreign or native Government (*Green v. Young*, 1701, 2 Salk. 444—British ship seized by British Government; *Aubert v. Gray*, 1862, 3 B. & S. 163, 169—Spanish ship seized by Spanish Government); but not such acts done by a Government which is hostile, or practically hostile (*Touteng v. Hubbard*, 1802, 3 Bos. & Pul. 291; 6 R. R. 791), nor (in a policy) the giving up of a voyage owing to the interdiction of commerce at, or blockade or hostile possession of, the port of destination (*Hadkinson v. Robinson*, 1803, 3 Bos. & Pul. 388; 7 R. R. 786; *Lubbock v. Rowcroft*, 1803, 5 Esp. 49); for the peril insured against must be one acting on the subject insured immediately, and not circuitously, and fear of blockade or seizure is not a peril in the ordinary policy (*Atkinson v. Ritchie*, 1809, 10 East, 532, Lord Ellenborough; 10 R. R. 372). But the contract may provide for this case; thus, under a bill of lading excepting restraints of princes, and providing that in case of blockade of the port of discharge, or if entering or discharging in the port of discharge shall be considered unsafe by the master by reason of war, the



master might land the goods at nearest safe port, where the ship was carrying a cargo of explosives for Yokohama, and when she got to Hong Kong war had broken out between China and Japan, and the master thinking that the cargo would be seized as contraband if carried to its destination, and therefore delivered it at Hong Kong, it was held that the delivery was prevented by the exception, and the shipowner was not liable (*Nobel's Explosives Co. v. Jenkins*, 1896, 1 Com. Cas. 436); and it has been laid down that an apprehension of capture founded on circumstances calculated to affect the mind of a master of ordinary courage, judgment, and experience, justifies delay in prosecuting a voyage under a charter-party excepting restraints of princes and rulers (*The San Roman*, 1873, L. R. 5 P. C. 301). The words "restraints of princes, rulers, political disturbances or impediments, during voyage," cover a delay owing to the railway by which the goods were to be sent to the port where the ship lay being in the hands of revolutionary troops, and a delay owing to the ship, after leaving that port, being obliged to pay dues at another port to the *de facto* Government there, after having already paid them at the first port to the *de jure* Government (*Smith v. Rosario Nitrate N. C. L.*, [1894] 1 Q. B. 174).

The word "people" does not include anything but the ruling power of a country; and the seizure of a cargo of corn by starving people on the Irish coast was held not to come within the exception (*Nesbitt v. Lushington*, 1792, 4 T. R. 783; 2 R. R. 519). In a charter-party the exception is considered to be for the benefit of the shipper no less than that of the shipowner; and it covers delay in discharging an outward cargo at a foreign port caused by the refusal of the military commander of hostile forces in possession of the port to allow grain (the homeward cargo) to be exported (*Bruce v. Nicolopulo*, 1855, 24 L. J. Ex. 321).

[*Authorities.*—Abbott, *Shipping*; Carver, *Carriage by Sea*; Arnould, *Marine Insurance*.]

## Principal and Accessory.—See ACCESSORY.

## Principal and Agent.

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*Definition and Nature of Agency.*—Where one person authorises another to represent him, or act on his behalf, and undertakes to be answerable for what that other does within the scope of his authority, and such other person undertakes to exercise the authority conferred upon him, and in the exercise thereof, to obey any lawful instructions which may be given to him by the first-mentioned person, the first-mentioned person is called a principal, the other person an agent, and the relation created between them a contract of agency. The difference between an agent and an independent contractor is that an agent undertakes to act in the matter of the agency subject to the directions and control of his employer, whereas an independent contractor does not, but merely contracts to perform certain specified work, or produce a certain specified result, the manner and means of performance or production being left to his discretion, except so far as they are specified by the contract (see *Reedie v. L. & N.-W. Rwy. Co.*, 1849, 4 Ex. Rep. 244; *Quarman v. Burnett*, 1840, 6 Mee. & W. 499). In the most perfect type of agency, where the agent acts and contracts in the name of the principal, the principal, and the principal alone, is responsible to third persons, and is entitled to sue them, in respect of the acts and contracts of the agent done and entered into on his behalf, the agent being looked upon as a mere instrument. But this type may be modified in various ways. The agent may not be authorised to pledge the credit of the principal directly to third persons. He usually has no such authority where the principal is a foreigner. The right of the principal to sue, and his liability to be sued, upon an instrument executed, or contract made, by the agent, may be excluded by the form of execution, or by the terms of the contract. The agent may, by contracting personally, pledge his own credit as well as that of the principal, in which case the other contracting party may elect whether he will charge the principal or the agent, and may be sued by either of them. It is an implied term of every contract of agency, that the principal will indemnify the agent against all expenses, losses, and liabilities incurred by him in the proper execution of his authority, and that the agent will pay over or account to the principal for all profits and benefits acquired in the course or by means of the agency. Sometimes an agent guarantees to the principal that the persons with whom he enters into contracts on the principal's behalf shall duly perform those contracts (see *DEL CREDERE AGENT*).

The relation of principal and agent constitutes no justification for the commission of a wrong. A contract of agency cannot impose upon the agent any obligation to do a wrongful act, nor discharge him from any liability in respect thereof. Where an agent, whether innocently or not,



commits a wrong by the authority of the principal, they are liable as joint wrong-doers. The same rule applies where a wrong is committed by an agent in the ordinary course of his employment on behalf of the principal, though the principal did not authorise, and even if he expressly forbade, the commission of the wrong. An agent who does an act which is obviously, or to his knowledge, wrongful, has no claim for indemnity under the contract of agency. In such a case any promise by the principal to indemnify him is void.

This article does not apply to agents of the Crown or Government; as to which, see PUBLIC AGENT.

*Capacity of Parties.*—The capacity of a person to enter into and incur liability upon a contract of agency, whether as principal or agent, depends upon his general capacity to contract (*Smally v. Smally*, 1700, 1 Eq. Ca. Abr. 6). A person may, however, be liable to third persons in respect of acts or contracts done or entered into by his authority, where such acts or contracts are such as he would be capable of doing or entering into in person, though the contract of agency by which the authority is conferred is not binding upon him, in consequence of his general incapacity to contract (*R. v. Longnor*, 1833, 4 Barn. & Adol. 647; *Drew v. Nunn*, 1879, 4 Q. B. D. 661; *Campbell v. Hooper*, 1855, 24 L. J. Ch. 644; *Ex parte Bradbury*, 1839, Mont. & Chit. 625). It is not necessary that the agent, in order to contract and act so as to bind the principal, should have capacity to contract or act on his own behalf. The act of an agent is in law deemed to be the act of the principal, and therefore all persons of sound mind, including infants and others not *sui juris*, are capable of acting as agents, though they may not be liable on the contract of agency.

*What may be Delegated.*—Except where otherwise provided by statute (e.g. by Lord Tenterden's Act), it is a general rule of law that a person may do by means of an agent whatever he has power to do himself (*Furnivall v. Hudson*, [1893] 1 Ch. 335, where a grantee of a bill of sale executed it as agent for the grantor). In *Tharsis Copper Co. v. La Société des Métaux*, 1889, 58 L. J. Q. B. 435, it was held that a foreign corporation, which had by a contract submitted to the jurisdiction of the English Court, might appoint an agent to accept service of the writ on its behalf, and that service on such an agent operated as a service on the corporation, though it was not a good service according to the Rules of Court. An exception to the rule exists in the case of powers, authorities, and duties of a confidential or personal nature. A person who is given a power or authority the exercise of which involves discretion must, as a general rule, exercise it in person. Thus, the donee of a special power of appointment cannot delegate the power to an agent (*Ingram v. Ingram*, 1740, 2 Atk. 88; *Topham v. Portland*, 1863, 32 L. J. Ch. 257). So, where the consent of a person is required for the execution of a power of appointment, he must give such consent in person, and cannot appoint an agent to consent in his stead (*Hawkins v. Kemp*, 1803, 3 East, 410). The general disability of an agent to delegate his authority is founded on the same principle. As to the employment of agents by trustees, see Trustee Act, 1893, s. 17; *Speight v. Gaunt*, 1883, 9 App. Cas. 1; *Fry v. Tapson*, 1884, 28 Ch. D. 268).

The question whether a specific legal duty may be performed by means of an agent or deputy depends upon the nature of the duty. A duty which is merely ministerial may be delegated, but not a duty the performance of which involves discretion or skill (*London County Council v. Hobbis*, 1897, 75 L. T. 688). In no case can a person, by delegating the performance of a duty imposed upon him, whether to an agent or an independent con-



tractor, escape from liability for the non-performance or improper performance of such duty (*Hughes v. Percival*, 1882, 8 App. Cas. 443; *Lemaitre v. Davis*, 1881, 19 Ch. D. 281; *Black v. Christchurch Co.*, [1894] App. Cas. 48; *Hardaker v. Idle*, [1896] 1 Q. B. 335).

Lord Tenterden's Act (9 Geo. IV. c. 14) requires that certain transactions, to be effectual in law, shall be evidenced by writing signed by the party to be charged, and it has been held that the provisions of the Act are not satisfied by the signature of an agent for such party, even if such signature be expressly ratified by the principal (*Williams v. Mason*, 1873, 28 L. T. 232; *Swift v. Jewesbury*, 1874, L. R. 9 Q. B. 301; *Hyde v. Johnson*, 1836, 2 Bing. N. C. 776. See, however, sec. 13 of the Mercantile Law Amendment Act, 1856, amending, in this respect, the 1st and 8th sections of Lord Tenterden's Act). As a general rule, however, it is a sufficient compliance with the provisions of a statute requiring a person's signature, if the name of that person is signed by a duly authorised agent, unless a contrary intention plainly appears (*France v. Dutton*, [1891] 2 Q. B. 208). An agent may be appointed to subscribe the name of his principal to the memorandum of association of a joint-stock company (*In re Whitley*, 1886, 32 Ch. D. 337), or to the instrument of dissolution of a building society (*Dennison v. Jeffs*, [1896] 1 Ch. 611), and such a signature will satisfy the provisions of sec. 6 of the Companies Act, 1862, or sec. 32 of the Building Societies Act, 1874.

*Co-Agents*.—An authority given to two or more agents jointly, and not severally, can only be validly exercised by them all acting in concert, unless it is provided that less than the full number of them shall form a quorum (*Brown v. Andrew*, 1849, 18 L. J. Q. B. 153; *Boyd v. Durand*, 1809, 2 Taun. 161; *Bell v. Nixon*, 1832, 9 Bing. 393; *In re Liverpool Household Stores*, 1890, 59 L. J. Ch. 616). And where an authority is given to two or more, it is presumed to be given to them jointly and not severally, unless a contrary intention appears from the nature or terms of the authority, or from the circumstances of the particular case. In *Brown v. Andrew* (cited *supra*) the act of six out of eight persons appointed to act as a managing committee, was held not binding on the principals. An authority given to two or more persons severally, or jointly and severally, may, in general, be executed by any one or more of them without the concurrence of the other or others (*Guthrie v. Armstrong*, 1822, 5 Barn. & Ald. 628). See, however, on this point, *Co. Litt.* 181 b.

*Agency, how Constituted*.—A contract of agency, like any other contract, can exist only by virtue of the mutual assent of the parties (*Markwick v. Hardingham*, 1880, 15 Ch. D. 349; *Pole v. Leask*, 1862, 33 L. J. Ch. 155). Such assent may be given expressly, or may be implied from the conduct or situation of the parties (*Pole v. Leask*, *supra*; *Roberts v. Ogilby*, 1821, 9 Price Ex. 269; *Moore v. Peachey*, 1891, 7 T. L. R. 748). The auctioneer at a sale by auction is an implied agent for the purpose of signing the contract of sale on behalf of the highest bidder, so as to satisfy the Statute of Frauds, or the 4th section of the Sale of Goods Act, 1893, the assent of such bidder being implied from his conduct in bidding at the sale (*Emmerson v. Heelis*, 1809, 2 Taun. 38; 11 R. R. 520; *White v. Proctor*, 1811, 4 Taun. 209; 13 R. R. 580; *Sims v. Landray*, [1894] 2 Ch. 318). The authority of the auctioneer, in such a case, is limited to signing at the time of the sale, and there is no such implication of authority in the case of his clerk, unless the bidder by words or signs shows that he assents to the clerk's signing for him instead of the auctioneer (*Bell v. Balls*, [1897] 1 Ch. 663). As to the implied authority



of married women to pledge their husbands' credit for necessities, see HUSBAND AND WIFE. If a man lives with a woman as his wife, she has implied authority to pledge his credit, during the continuance of the cohabitation, to the same extent as if she were legally married to him (*Watson v. Threlkeld*, 1794, 2 Esp. 637; 5 R. R. 760; *Ryan v. Sams*, 1848, 12 Ad. & E. N. S. 460). The assent of the principal to the contract of agency may be given subsequent to the performance of the contract by the agent. It is a principle of the law of agency, that where an act is done by a person on behalf of another, though without any precedent authority, express or implied, the person on whose behalf the act is done may, as a general rule, by subsequently ratifying it, render it as valid, to all intents, as if he had previously authorised it; and such ratification may be implied from his conduct. Another principle of the law of agency, founded on the ordinary doctrine of estoppel *in pais*, is that if a person by his conduct holds out that a contract of agency exists between him and another person, he will not be permitted to deny the existence thereof, with respect to any third persons acting on the faith of such holding out (*Pole v. Leask*, 1862, 33 L. J. Ch. 155). The relation of principal and agent, then, may be constituted by express agreement between the principal and agent; by implication of law from their conduct or situation; or by the subsequent ratification by the principal of acts done on his behalf; and a person may be estopped by his conduct from denying the existence of such a relation, though it does not in fact exist. In some of the cases of so-called "agency of necessity," most of which are connected with maritime law (see AVERAGE; SALVAGE), the assent of the principal is purely fictitious; and in others, notably in the case of a wife deserted by her husband (see *Johnston v. Sumner*, 1858, 3 H. & N. 261; *Harris v. Morris*, 1801, 4 Esp. 41; 2 R. R. 786), the agent has authority in law to bind the principal, notwithstanding his express dissent; but such cases are instances of QUASI-CONTRACTS, not true contracts of agency.

*Appointment of Agent.*—No particular formality is requisite for the appointment of an agent, except in the case of an appointment by a corporation, or where the agent is authorised to execute a deed on behalf of the principal. An agent may be appointed, and his authority conferred, verbally, for the purpose of entering into and signing a written contract, so as to satisfy the provisions of the Statute of Frauds, or the 4th section of the Sale of Goods Act, 1893 (*Mortlock v. Buller*, 1804, 10 Ves. Jun. 311; 7 R. R. 417; *Coles v. Trecothick*, 1804, 9 Ves. Jun. 234; 7 R. R. 167; *Heard v. Pilley*, 1869, L. R. 4 Ch. 548).

Authority to execute a deed must be given by an instrument under seal (see POWER OF ATTORNEY), except where the deed is executed in the name and presence of the principal, and he there and then authorises its execution, in which case the authority may be given by word of mouth, or by signs (*R. v. Longnor*, 1833, 4 Barn. & Adol. 647; *Berkeley v. Hardy*, 1826, 5 Barn. & Cress. 355; *Harrison v. Jackson*, 1797, 7 T. R. 207; 5 R. R. 422). The memorandum of association of a joint-stock company is not a deed, and the name of a principal may be subscribed thereto by an agent appointed by parol (*In re Whitley*, 1886, 32 Ch. D. 337).

At common law, a corporation could only appoint an agent by an instrument under its common seal (*Kidderminster v. Hardwicke*, 1873, L. R. 9 Ex. 13; *R. v. Stamford*, 1844, 6 Ad. & E. N. S. 433). In *Austin v. Bethnal Green Guardians*, 1874, L. R. 9 C. P. 91, it was held that the engagement, by a board of guardians, of a clerk to the master of a work-house, must be under seal, to bind the board of guardians. And in *Arnold*



v. *Mayor of Poole*, 1842, 5 Sco. N. R. 741, a similar decision was given in the case of the appointment of a solicitor by a municipal corporation (see also *Sutton v. Spectacle Makers Co.*, 1864, 10 L. T. 411). Various exceptions to the rule have, however, been established. It does not apply at all in the case of trading corporations (*South of Ireland Colliery Co. v. Waddle*, 1869, L. R. 4 C. P. 617; *Henderson v. Australian S. N. Co.*, 1855, 5 El. & Bl. 409), or joint-stock companies (30 & 31 Vict. c. 131, s. 37; 8 & 9 Vict. c. 16, s. 97), or industrial or provident societies (39 & 40 Vict. c. 45, s. 11 (12)). And whenever the affixing of the seal would be very inconvenient, a corporation may bind itself by parol (*Church v. Imp. Gas Co.*, 1838, 6 Ad. & E. 846; *Ludlow v. Charlton*, 1840, 6 Mee. & W. 815, 822).

*Ratification.*—The doctrine of ratification, as expressed in the maxim *Omnis ratihabitio retrotrahitur et mandato priori æquiparatur*, is that where one person does any act or enters into any transaction professedly on behalf of another person, the subsequent ratification by such other person of such act or transaction is equivalent to his having previously authorised it. The doctrine applies not only where an agent exceeds his authority, but also where the person doing the act or entering into the transaction has no authority to act for the other at all.

*What may be ratified.*—The principle of ratification applies to torts, as well as to contracts and other acts and transactions (*Wilson v. Tunman*, 1843, 6 Man. & G. 236; *Hilberry v. Hatton*, 1864, 2 H. & C. 822; *Ancona v. Marks*, 1862, 7 H. & N. 686). But it applies only to voidable acts and transactions, and not to such as are in their inception void (*Spackman v. Evans*, 1868, L. R. 3 H. L. 171, 244; *Banque Jacques Cartier v. Banque D'Epargne*, 1887, 13 App. Cas. 111). On this ground it was held in *Brook v. Hook*, 1871, L. R. 6 Ex. 89, that a forgery was incapable of ratification, and from the wording of sec. 24 of the Bills of Exchange Act, 1882, the Legislature seems to have intended to confirm that view. Lord Blackburn, however, in *M'Kenzie v. British Linen Co.*, 1881, 6 App. Cas. 82, expressed a decided opinion to the effect that the execution of a forged instrument might be ratified so as to render the person ratifying it civilly liable on the instrument, though not so as to make a defence for the forger against a criminal charge. A corporation or incorporated company cannot bind itself by the ratification of any contract or act which is *ultra vires*, even with the assent of every one of its members, because such a contract or act is one which it has no power to authorise, and which is therefore, so far as concerns the corporation or company, absolutely void (*Ashbury Carriage Co. v. Riche*, 1875, L. R. 7 H. L. 653; *Flitcroft's case*, 1882, 21 Ch. D. 519).

*Who may ratify.*—An act or transaction can only be ratified by the person on whose behalf it was assumed to be done or entered into. If A. professes to make an agreement on his own behalf, or on behalf of B., the agreement cannot be ratified by C. (*Saunderson v. Griffiths*, 1826, 5 Barn. & Cress. 909; *Heath v. Chilton*, 1844, 12 Mee. & W. 632). Where a colonel of a volunteer corps made a contract professedly on behalf of the corps, both he and the other contracting party erroneously thinking that the corps as an entity might be bound, it was held that the contract could not be ratified by individual members of the corps, because it was not made on their behalf as individuals (*Jones v. Hope*, 1880, 3 T. L. R. 247, note). So, if a sheriff, acting under a valid writ of execution, wrongfully seizes goods which do not belong to the debtor, the execution creditor cannot ratify such wrongful seizure, because the act is not done on his behalf,



but in performance of a public duty (*Wilson v. Tunman*, 1843, 6 Man. & G. 236; *Woollen v. Wright*, 1862, 1 H. & C. 554). It is also necessary that the principal should be in existence at the time when the act is done. An incorporated company cannot ratify a contract which was entered into before its incorporation (*Kelner v. Baxter*, 1866, L. R. 2 C. P. 174; *In re Empress Engineering Co.*, 1880, 16 Ch. D. 125), though it may make a new contract on the same terms (*Howard v. Patent Ivory Co.*, 1888, 38 Ch. D. 156). It is not necessary, however, that the principal should be known to the agent at the time when the act is done. An insurance may be effected on behalf, generally, of every person interested in the property insured, and any person interested may subsequently ratify the insurance to the extent of his interest (*Hagedorn v. Oliverson*, 1814, 2 M. & S. 485; 15 R. R. 317). So, a person may act on behalf of an heir, or an administrator, or the owner of particular property, whoever he may be, though unascertained and unknown to him, and when ascertained, the person on whose behalf the act was done may ratify it (*Lyell v. Kennedy*, 1889, 14 App. Cas. 437; *Foster v. Bates*, 1843, 12 Mee. & W. 226). An executor or administrator may ratify acts or transactions done or entered into on behalf of the estate, though they were done or entered into before the grant of probate or letters of administration, because his title relates back to the time of the death of the deceased (*Whitehead v. Taylor*, 1839, 10 Ad. & E. 210; *Foster v. Bates*, *supra*).

*Limitations to the Doctrine.*—The doctrine of ratification is subject to the following limitations and qualifications:—(1) Where it is essential to the validity of a particular act that it should be done within a fixed time, the ratification of the act after that time has expired does not affect the rights of third persons. In *Dibbins v. Dibbins*, [1896] 2 Ch. 348, where it was agreed between two partners that the survivor of them should have the option of purchasing the share of the other, upon giving notice to his executors within a specified time after his death, it was held that a notice given within such time on behalf of the survivor, but without his authority, could not be ratified, so as to bind the executors, after the time for giving notice had expired. So, a notice to quit cannot be rendered binding on a tenant by the landlord's ratification after the expiration of the time for giving notice (*Doe d. Mann v. Walters*, 1830, 10 Barn. & Cress. 626; *Doe d. Lyster v. Goldwin*, 1841, 1 Gal. & Dav. 463). See, also, *Bird v. Brown*, 1850, 4 Ex. Rep. 786, where a ratification of a stoppage of goods *in transitu* was held ineffectual because the ratification took place after the goods had arrived at their destination. (2) Where, except in the case of the ratification of a contract, an act is of such a nature that, if it had been duly authorised, it would have imposed a duty on any third person, the ratification of such act does not operate to impose such duty retrospectively. Thus, the ratification by a creditor of an unauthorised demand for a debt, does not deprive the debtor of his right to plead and take advantage of a tender made previously to the demand (*Coles v. Bell*, 1808, 1 Camp. N. P. 478; *Coore v. Callaway*, 1794, 1 Esp. 115; see also *Solomons v. Dawes*, 1794, 1 Esp. 83). (3) A ratification cannot operate to divest or prejudicially affect any proprietary right vested in any third person at the time of the ratification (*Donnelly v. Popham*, 1807, 1 Taun. 1; 9 R. R. 687; *Bird v. Brown*, 1850, 4 Ex. Rep. 786). (4) A payment cannot be ratified after the money paid has been returned to the person who paid it. If a person pays a debt without the authority of the debtor, the debtor, though he at first refuses to recognise the payment, may subsequently ratify and take advantage of it (*Simpson v. Eggington*, 1855, 10 Ex. Rep. 845); but the creditor may, in



such a case, if he chooses, return the money to the person who paid it, and if he does so, the debtor cannot afterwards ratify or take advantage of the payment (*Walter v. James*, 1871, L. R. 6 Ex. 124). (5) Where an act is wrongful on the part of the person doing it, because it is done without authority, it can only be justified by a ratification at a time when it could lawfully be done by the principal (*Bird v. Brown*, *supra*).

*Ratification of Contracts.*—A contract must be ratified within a reasonable time after it is entered into, and before it is time for the other contracting party to commence the performance thereof, in order by the ratification to render it binding upon him (*Met. Asylum Board v. Kingham*, 1890, 6 T. L. R. 217). A contract of insurance may, however, be ratified after the loss of the property insured, though the principal have notice of such loss at the time of the ratification (*Williams v. North China Ass. Co.*, 1876, 1 C. P. D. 757; *Cory v. Patton*, 1874, L. R. 9 Q. B. 577). And a person may ratify a contract made on his behalf, though he at first repudiates it as not having been made by his authority (*Soames v. Spencer*, 1822, 1 Dow. & Ry. K. B. 32). Where a person accepts an offer on behalf of another, the acceptance may be ratified, and the contract thereby be made complete and binding on the person making the offer, although before the time of the ratification such person has given notice to the principal of his withdrawal of the offer; because the ratification relates back to the time of the acceptance, and thereby renders the withdrawal of the offer inoperative (*Bolton v. Lambert*, 1888, 41 Ch. D. 295).

*Form and Conditions of Ratification.*—The execution of a deed can only be effectively ratified by matter of record or by deed (*Oxford v. Crow*, [1893] 3 Ch. 535; *Hunter v. Parker*, 1840, 7 Mee. & W. 322; *Tupper v. Foulkes*, 1861, 9 C. B. N. S. 797). Subject to this, a ratification may be express or implied, and no particular formality is necessary. A written contract may be ratified verbally, or by conduct, even if it be a contract which by statute is unenforceable unless evidenced by writing (*Macleay v. Dunn*, 1828, 1 Moo. & P. 761; *Soames v. Spencer*, 1822, 1 Dow. & Ry. K. B. 32). A ratification of an act or transaction will be implied whenever the conduct of the person on whose behalf it is done or entered into is such as to indicate an intention by him to adopt or recognise it in whole or in part, and a ratification of part of a transaction operates as a ratification of the whole (*Hovil v. Pack*, 1806, 7 East, 164; *Benham v. Batty*, 1865, 12 L. T. 266; *Ferguson v. Carrington*, 1829, 9 Barn. & Cress. 59; *Keay v. Fenwick*, 1876, 1 C. P. D. 745; *Bristow v. Whitmore*, 1861, 9 Cl. H. L. 391). The receipt of the purchase-money, or part thereof, operates as a ratification of an unauthorised sale (*The Bonita*, 1861, 30 L. J. Ad. 145; *Brewer v. Sparrow*, 1827, 7 Barn. & Cress. 310). So, where a principal, whose agent had purchased goods at a price in excess of his limit, disposed of a portion of the goods, he was held to have ratified the purchase, though he expressly objected to it on account of the price (*Cornwal v. Wilson*, 1750, 1 Ves. Jun. 510). In the case of an agent acting in excess of his authority, a ratification may be implied from the mere silence or acquiescence of the principal (*Prince v. Clark*, 1823, 1 Barn. & Cress. 186; *Pott v. Bevan*, 1844, 1 Car. & Kir. 335; *Robinson v. Gleadow*, 1835, 2 Bing. N. C. 156). A person will not be deemed, however, to ratify any act or transaction done or entered into without his authority, unless at the time of the ratification he has a full knowledge of all the material circumstances (*Edwards v. L. & N.-W. Rwy. Co.*, 1870, L. R. 5 C. P. 445; *The Bonita*, 1861, Lush. 252; *Gunn v. Roberts*, 1874, L. R. 9 C. P. 331; *Lewis v. Read*, 1845, 13 Mee. & W. 834), or his conduct is such as to clearly indicate an intention by him to take the risk,



and ratify the act or transaction, whatever may have been the circumstances (*Haselar v. Lemoyne*, 1858, 5 C. B. N. S. 530; *Fitzmaurice v. Bayley*, 1856, 6 El. & Bl. 868; *Marsh v. Joseph*, [1897] 1 Ch. 214); but it is not necessary that he should be aware of the legal effect of the act or transaction (*Powell v. Smith*, 1872, L. R. 14 Eq. 85).

*Effect of Ratification.*—Subject to the limitations and qualifications mentioned above, the consequences of a ratification are the same in all respects as if the act or transaction had been previously authorised. As between principal and agent, the agent is discharged from liability for having exceeded his authority (*Clarke v. Perrier*, 1679, 2 Freem. K. B. 48; *Smith v. Cologan*, 1788, 2 T. R. 189; *Cornwal v. Wilson*, 1750, 1 Ves. 510; *Risbourg v. Bruckner*, 1858, 3 C. B. N. S. 812; *Brewer v. Sparrow*, 1827, 7 Barn. & Cress. 310), and has the same rights of remuneration and indemnity as he would have had if he had been duly authorised (*Keay v. Fenwick*, 1876, 1 C. P. D. 745; *Mason v. Clifton*, 1863, 3 F. & F. 899; *Frixione v. Tagliaferro*, 1856, 10 Moo. P. C. 175). A person cannot take the benefit of a transaction unless he also adopts the burdens connected therewith (*Bristow v. Whitmore*, 1861, 9 Cl. H. L. 391; *Hall v. Laver*, 1842, 1 Hare, 571). With respect to third persons, if a contract is ratified, it becomes the contract of the principal, and he is entitled to sue, and liable to be sued, upon it, and the contract is deemed to have been made by his duly authorised agent within the meaning of the Statute of Frauds (*Macleane v. Dunn*, 1828, 1 Moo. & P. 761; *Soames v. Spencer*, 1822, 1 Dow. & Ry. K. B. 32; *Williams v. North China Ass. Co.*, 1876, 1 C. P. D. 757). The ratification of a contract also discharges the agent from liability to the other contracting party in respect of the implied warranty of authority. The ratification of a wrongful act renders the principal liable as a joint wrong-doer with the agent (*Hilberry v. Hatton*, 1864, 2 H. & C. 822; *Eastern Counties Rwy. Co. v. Broom*, 1851, 6 Ex. Rep. 314), unless the act would have been justifiable at the instance of the principal, in which case the effect of the ratification is to discharge the agent from liability for the wrong, even if an action be pending against him in respect thereof at the time of the ratification (*Whitehead v. Taylor*, 1839, 10 Ad. & E. 210; *Hull v. Pickersgill*, 1819, 3 Moo. K. B. 612; 21 R. R. 598). A ratification does not invest the agent with any new authority (*Irvine v. Union Bank of Australia*, 1877, 2 App. Cas. 366).

*Authority of Agents.*—The authority of an agent may be express or implied. It cannot in any case exceed the powers of the principal, from whom it is derived, because a person cannot authorise what he has himself no power to do (*Shrewsbury Rwy. Co. v. L. & N.-W. Rwy. Co.*, 1857, 6 Cl. H. L. 113; *Poulton v. L. & S.-W. Rwy. Co.*, 1867, L. R. 2 Q. B. 534; *Montreal Ass. Co. v. McGillivray*, 1859, 13 Moo. P. C. 87). The authority may be conferred, and its nature and extent defined, by deed, by writing, or by word of mouth, or may be inferred from a course of dealing between the principal and agent (*Pole v. Leask*, 1860, 28 Beav. 562). As to the construction of an authority given by deed, see POWER OF ATTORNEY. Where the authority is given verbally, or by writing not under seal, it is construed liberally, having due regard to the purposes for which it is given (*Pole v. Leask*, 1860, 28 Beav. 562; *Entwistle v. Dent*, 1848, 1 Ex. Rep. 812; *Pariente v. Lubbock*, 1855, 8 De G., M. & G. 5); but not so as to authorise the agent to act otherwise than in the usual way and according to the ordinary course of business (*Wiltshire v. Sims*, 1808, 1 Camp. N. P. 258; 10 R. R. 673; *Helyear v. Hawke*, 1803, 5 Esp. 72). If the authority is given in such ambiguous terms as to be reasonably capable of more than one construction, and the agent in good faith adopts and acts upon one of the constructions



of which it is capable, he is deemed to have acted within the scope of the authority, and the principal is bound with respect to the agent and also with respect to third persons, though the construction adopted and acted upon was not the one intended by the principal (*Ireland v. Livingston*, 1872, L. R. 5 H. L. 395; *Boden v. French*, 1851, 10 C. B. 886).

*Authority to receive Payment.*—Where an agent is authorised to receive payment of money, he has, *prima facie*, only authority to receive payment in the ordinary course of business and in cash (*Sykes v. Giles*, 1839, 5 Mee. & W. 645; *Coupé v. Collyer*, 1890, 62 L. T. 927). Thus, if an agent, being authorised to sell goods and receive payment of the price, sells the goods on credit, the principal is not bound by a payment made to the agent before the expiration of the credit, unless it is customary in the ordinary course of the particular business to make payments before they are due (*Catterall v. Hindle*, 1867, L. R. 2 C. P. 368; *Heisch v. Carrington*, 1833, 5 Car. & P. 471; *Breming v. Mackie*, 1862, 3 F. & F. 197). So, where an auctioneer is authorised to receive payment for goods sold, or an insurance broker to receive payment of a loss, he has *prima facie* no authority to take a bill of exchange in payment (*Williams v. Evans*, 1866, L. R. 1 Q. B. 352; *Ferrers v. Robbins*, 1835, 2 C. M. & R. 152; *Hine v. S. S. Insurance Syndicate*, 1895, 72 L. T. 79). Nor is an agent justified in taking a cheque in lieu of cash unless it is customary to do so in the ordinary course of the business in which he is employed (*Papé v. Westacott*, [1894] 1 Q. B. 272; *Blumberg v. Life Interests, etc., Corporation*, [1897] 1 Ch. 171; *Bridges v. Garrett*, 1870, L. R. 5 C. P. 451). A custom or usage of a particular market, whereby a set-off against, or settlement of accounts with, an agent, is considered equivalent to payment, is only binding as between the agent and the person with whom the settlement is made, and not upon the principal, unless at the time when he authorised the agent to receive payment he knew of the existence of such custom or usage, and agreed to be bound thereby (*Pearson v. Scott*, 1878, 9 Ch. D. 198; *Blackburn v. Mason*, 1893, 68 L. T. 510; *Sweeting v. Pearce*, 1859, 7 C. B. N. S. 449). If, however, an agent is authorised to receive payment, and to retain the amount received, or part thereof, in discharge of a debt due to him from the principal, he has authority, to the extent of his debt, to settle in whatever way he pleases with the person from whom he is authorised to receive payment (*Barker v. Greenwood*, 1836, 2 Y. & C. Ex. 414).

*Implied Authority.*—Subject to the express instructions of the principal, an agent has implied authority to do whatever is necessary for, or ordinarily incidental in, the usual course of business, to the effective execution of his express authority (*Beaufort v. Neeld*, 1845, 12 Cl. & Fin. 248; *Pole v. Leask*, 1860, 28 Beav. 562; *Dingle v. Hare*, 1859, 7 C. B. N. S. 145; *Young v. Cole*, 1837, 3 Bing. N. S. 724). Thus, authority to enter into a binding contract implies authority to sign a memorandum thereof, where such a memorandum is required by statute (*Durrell v. Evans*, 1862, 1 H. & C. 174; *Parton v. Crofts*, 1864, 16 C. B. N. S. 11), and to do everything in the usual course of business necessary to complete the bargain (*Bayley v. Wilkins*, 1849, 7 C. B. 886). Authority to procure a bill to be discounted implies authority to warrant the bill, but not to indorse it in the principal's name (*Fenn v. Harrison*, 1791, 3 T. R. 757; 4 T. R. 177). Authority to find a purchaser for property implies authority to describe the property, and to state any facts or circumstances having a bearing upon its value (*Mullens v. Miller*, 1882, 22 Ch. D. 194); but not to enter into a contract for the sale thereof (*Chadburne v. Moore*, 1892, 61 L. J. Ch. 674; *Hamer v. Sharp*, 1874, L. R. 19 Eq. 108). Authority



to sell a horse implies authority to warrant it, if either the principal or the agent is a horsedealer or other person who is accustomed to buying and selling horses (*Howard v. Sheward*, 1866, L. R. 2 C. P. 148; *Baldry v. Bates*, 1885, 52 L. T. 620), or if the horse is to be sold at a fair or public market-place (*Brooks v. Hassall*, 1883, 49 L. T. 569), but not, it seems, if neither principal nor agent is accustomed to buying and selling horses, and the horse is to be sold privately (*Brady v. Todd*, 1861, 9 C. B. N. S. 592). Authority to subscribe policies of insurance on behalf of an underwriter implies authority to adjust losses arising under the policies (*Richardson v. Anderson*, 1805, 1 Camp. N. P. 43; 10 R. R. 628), and to refer to arbitration any disputes about such losses (*Goodson v. Brooke*, 1815, 4 Camp. N. P. 163). So, a bailiff who is authorised to levy a distress has implied authority to receive the rent and expenses due, and a tender thereof to him operates as a tender to the landlord (*Hatch v. Hale*, 1850, 15 Ad. & E. N. S. 10). But an agent has no implied authority to do anything which is neither necessary for, nor ordinarily incidental to, the execution of his express authority in the usual way. Thus, an agent who is authorised merely to deliver a horse has no implied authority to warrant it (*Woodin v. Burford*, 1834, 2 C. & M. 391). An agent who is authorised to receive rents has no implied authority, as such, to distrain (*Ward v. Shew*, 1833, 9 Bing. 608). An agent employed to sell an estate has no implied authority, as such, to receive the purchase-money (*Mynn v. Joliffe*, 1834, 1 Moo. & R. 326). So, an auctioneer who is authorised to sell goods by auction has no implied authority to sell them by private contract, even if the public sale proves abortive (*Daniel v. Adams*, 1764, Amb. 495; *Marsh v. Jelf*, 1862, 3 F. & F. 234). Nor does authority to sell goods imply authority to barter or pledge them (*City Bank v. Barrow*, 1880, 5 App. Cas. 664; *Guerreiro v. Peile*, 1820, 3 Barn. & Ald. 616; 22 R. R. 500; *Martini v. Coles*, 1813, 1 M. & S. 140; *Gill v. Kymer*, 1821, 5 Moo. K. B. 503). So, authority to send a draft contract for approval does not imply authority to sign a memorandum of the contract so as to satisfy the Statute of Frauds (*Smith v. Webster*, 1876, 3 Ch. D. 49). Nor does authority to enter into contracts imply authority to cancel or vary a contract made in pursuance thereof (*Xenos v. Wickham*, 1866, L. R. 2 H. L. 296; *Nelson v. Aldridge*, 1818, 2 Stark. N. P. 435; 20 R. R. 709).

Subject to the express terms of his authority and instructions, where an agent is given general authority to manage or carry on a particular trade or business, or otherwise to act in a particular capacity, he has implied authority to do whatever is necessary for or incidental to the ordinary conduct of such a trade or business, or whatever is within the scope of the usual authority of a person employed in such a capacity. Thus, a manager of an estate has implied authority to grant the usual and customary leases, and to give and receive notices to quit to and from the tenants (*Peers v. Sneyd*, 1853, 17 Beav. 151; *Papillon v. Brunton*, 1860, 5 H. & N. 518; *Jones v. Phipps*, 1868, L. R. 3 Q. B. 567). The managing owner of a ship has implied authority to pledge the credit of his co-owners for repairs, and all such other things as are necessary for the usual or suitable employment of the ship (*The Huntsman*, [1894] Prob. 214; *Barker v. Highley*, 1863, 15 C. B. N. S. 27). A manager of a beerhouse, to order cigars for sale in the beerhouse (*Watteau v. Fenwick*, [1893] 1 Q. B. 346). The general manager of a railway company, to pledge the company's credit for medical attendance for a servant of the company (*Walker v. G. W. Rwy. Co.*, 1867, L. R. 2 Ex. 228). A traveller for the sale of goods in the provinces, to receive payment of the price of goods sold, but not to take other goods



by way of payment (*Howard v. Chapman*, 1831, 4 Car. & P. 508). The matron of a hospital, to pledge the credit of the managing committee for butcher's meat for the use of the hospital (*Real and Personal Advance Co. v. Phalempin*, 1893, 9 T. L. R. 569). On the other hand, a mere rent collector has not implied authority, as such, to receive a notice of intention to quit from a tenant (*Pearse v. Boulter*, 1860, 2 F. & F. 133); nor a steward to grant leases for terms of years (*Collen v. Gardner*, 1856, 21 Beav. 540); nor a cashier of a picture engraver to sell the engravings (*Graves v. Masters*, 1883, 1 C. & E. 73). Nor has a stationmaster implied authority, as such, to pledge the company's credit for medical attendance for an injured passenger (*Cox v. Midland Rwy. Co.*, 1849, 3 Ex. Rep. 268); nor a local agent of an insurance company to contract to grant a policy on the company's behalf (*Linford v. Provincial Insurance Co.*, 1864, 34 Beav. 291); nor a manager of a bank to give into custody a supposed offender, on behalf of the bank (*Bank of New South Wales v. Owston*, 1879, 4 App. Cas. 270). Authority to arrest persons, or give them into custody, is only implied when the duties of the agent would not be efficiently performed without such authority (*S. C. Stevens v. Hinshelwood*, 1891, 55 J. P. 341; *Allen v. L. & S.-W. Rwy. Co.*, 1870, L. R. 6 Q. B. 65; *Abrahams v. Deakin*, [1891] 1 Q. B. 516).

*Authority implied from Special Customs and Usages.*—An agent has implied authority to act, in the execution of his express authority, according to the reasonable rules, regulations, customs, and usages of the particular place, market, or business in which he is employed (*Sutton v. Tatham*, 1839, 10 Ad. & E. 27; *Pollock v. Stables*, 1848, 12 Ad. & E. N. S. 765; *Foster v. Pearson*, 1835, 1 C. M. & R. 849; *Hodgkinson v. Kelly*, 1868, 37 L. J. Ch. 837; *Cropper v. Cook*, 1868, L. R. 3 C. P. 194). Thus, if an agent is authorised to sell goods, and it is customary in the trade to warrant that particular class of goods, or to sell them on credit, he has implied authority to warrant them, or sell them on credit, as the case may be (*Dingle v. Hare*, 1859, 7 C. B. N. S. 145; *Pelham v. Hilder*, 1841, 1 Y. & C. C. 3). So, if a stockbroker is authorised to transact business on the Stock Exchange, he has implied authority to act according to the reasonable regulations and usages there in force (see BROKER). This principle does not, however, apply when the usage or custom is an unreasonable one. In such a case, the agent has no implied authority to act in accordance therewith, unless the principal was aware of the existence of the usage or custom at the time when he conferred the authority. In *Robinson v. Mollett*, 1874, L. R. 7 H. L. 802, it was proved to be the custom in the tallow trade for a broker, when authorised to buy tallow, to make one contract in his own name for the purchase of a sufficiently large quantity to satisfy the orders of several principals, and parcel it out amongst them, and the custom was rejected as unreasonable, on the ground that the effect of it was to change the intrinsic character of the contract of agency by turning the agent into a principal, and so giving him an interest in conflict with his duty.

*Delegation of Agency.*—The personal qualifications and character of the agent are frequently an important consideration in the making of a contract of agency, and he is therefore deemed, as a general rule, to undertake to exercise in person the authority conferred upon him, in the absence of agreement to the contrary. And an agent cannot delegate to another person powers which have been given to him on the understanding that he would exercise them himself (*delegatus non potest delegare*). Auctioneers (*Coles v. Trecothick*, 1804, 9 Ves. 234; 7 R. R. 167), factors (*Cockran v. Irlam*, 1813, 2 M. & S. 301; 15 R. R. 257; *Catlin v. Bell*, 1815, 4 Camp.



N. P. 183), brokers (*Henderson v. Barnewell*, 1827, 1 Y. & J. 387), directors (*Howard's case*, 1866, L. R. 1 Ch. 561; *Cartmell's case*, 1874, L. R. 9 Ch. 691), and other agents whose employment involves trust or confidence in their integrity, discretion, or skill (*Combe's case*, 9 Co. Rep. 75; *Blore v. Sutton*, 1816, 3 Mer. 237; 17 R. R. 74), have therefore, *primâ facie*, no power to delegate the authority conferred upon them. So, where a ship-master was authorised to sell certain goods, it was held that he had no power to appoint another person to sell them, though he himself was unable to find a purchaser (*Catlin v. Bell*, 1815, 4 Camp. N. P. 183). An agent may, however, appoint a substitute or sub-agent, and delegate his authority to him, with the express or implied assent of the principal. Such assent will be implied where it appears from the conduct of the principal that he intended the agent to have power to delegate his authority, or where the authority is of such a nature as to necessitate its being exercised through a substitute or sub-agent, or unforeseen emergencies arise in the course of the agency which necessitate its being so exercised (*De Bussche v. Alt*, 1877, 8 Ch. D. 286; *Quebec, etc., Rwy. Co. v. Quinn*, 1858, 12 Moo. P. C. 232; *Dew v. Metropolitan Rwy. Co.*, 1885, 1 T. L. R. 358). Authority to employ a sub-agent may also be implied from the usage of the particular trade, profession, or business in which the agent is employed, provided that such usage is not unreasonable, nor inconsistent with the express terms of the contract of agency (*De Bussche v. Alt*, *supra*; *Griffiths v. Williams*, 1787, 1 T. R. 710; *Weary v. Alderson*, 1837, 2 Moo. & R. 127; *Solley v. Wood*, 1852, 16 Beav. 370). The maxim *delegatus non potest delegare* does not apply where the authority is merely ministerial, and the exercise thereof does not involve discretion or confidence. Thus, an agent may delegate to a sub-agent authority to draw or indorse a particular bill of exchange in the name of the principal (*Ex parte Sutton*, 1788, 2 Cox, 84; *Lord v. Hall*, 1848, 2 Car. & Kir. 698). So, it was held that though the liquidators of a company had no power to authorise one of their number to accept bills of exchange generally on behalf of them all, because the exercise of such an authority involved discretion, yet they might authorise him to accept a particular bill on their behalf (*Ex parte Birmingham Banking Co.*, 1868, L. R. 3 Ch. 651). As to the delegation of authority to sign a note or memorandum of a contract so as to satisfy the Statute of Frauds, see *White v. Proctor*, 1811, 4 Taun. 209; 13 R. R. 580; *Coles v. Trecothick*, 1804, 9 Ves. Jun. 234; 7 R. R. 167; *Blore v. Sutton*, 1816, 3 Mer. 237; 17 R. R. 74; *Bell v. Balls*, [1897] 1 Ch. 663.

*Principal and Sub-Agent.*—Where a substitute or sub-agent is appointed by an agent without the authority, express or implied, of his principal, no privity of contract arises between such substitute or sub-agent and the principal. The principal, therefore, incurs no liability to the substitute or sub-agent in respect of his disbursements or remuneration (*Schmaling v. Tomlinson*, 1815, 6 Taun. 147; *Mason v. Clifton*, 1863, 3 F. & F. 899; *Solly v. Rathbone*, 1814, 2 M. & S. 298), and is not bound by his acts, unless he ratifies them (*Dunlop v. De Murrieta*, 3 T. L. R. 166; *Blore v. Sutton*, 1816, 3 Mer. 237; 17 R. R. 74; *Wray v. Kemp*, 1883, 26 Ch. D. 169). In the case of a substitute or sub-agent appointed with the principal's express or implied assent, the question whether privity of contract arises between them depends upon the intention of the parties. If the agent was authorised, and intended, when appointing the substitute or sub-agent, to establish the relationship of principal and agent between the principal and such substitute or sub-agent, and such was also the intention of the substitute or sub-agent, then privity of contract is established in accordance



with such intention. In *De Bussche v. Alt*, 1877, 8 Ch. D. 286, where a ship was consigned to an agent in China, for sale, and such agent, with the knowledge and consent of the principal, employed another agent to sell her, it was held that privity of contract existed between the last-mentioned agent and the principal, so as to make such agent answerable directly to the principal for the due performance of his duties. But, as a general rule, there is no privity of contract between a principal and a sub-agent, the sub-agent being answerable to the agent employing him, and the agent to the principal (*Stephens v. Badcock*, 1832, 3 Barn. & Adol. 354; *Robbins v. Fennell*, 1847, 11 Ad. & E. N. S. 248; *Sims v. Brittain*, 1832, 4 Barn. & Adol. 375; *Mortagu v. Forwood*, [1893] 2 Q. B. 350; *Ex parte Edwards*, 1881, 7 Q. B. D. 155). In *New Zealand, etc., Land Co. v. Watson*, 1881, 7 Q. B. D. 374, a factor, employed on a *del credere* commission to sell goods, sold them through a broker, who received the proceeds and made payments on account to the factor from time to time. It was held that there was no privity of contract between the broker and the principal, and that the broker was not liable to account to the principal for the proceeds remaining in his hands. So, in *Lockwood v. Abdy*, 1845, 14 Sim. 437, it was held that a sub-agent appointed by an agent was not liable to render an account of his agency to the principal, but only to the agent appointing him, though the sub-agent had taken over the entire management of the principal's affairs, and communicated directly with him.

#### RELATIONS BETWEEN PRINCIPAL AND AGENT.

The rights and duties of a principal and agent, as between themselves, depend upon the intention of the parties, to be ascertained from the terms of the contract of agency and the course of dealing between them. The rights and duties implied by law, as incident to the relationship of principal and agent, may be varied or excluded by agreement, express or implied.

*Duties of Agents generally.*—The general duties of an agent are to perform the contract of agency (*Turpin v. Bilton*, 1843, 5 Man. & G. 455); to strictly pursue the terms of his authority, and obey the instructions of the principal, except where such instructions are unlawful (*Smart v. Sandars*, 1846, 3 C. B. 380; *Smith v. Lascelles*, 1788, 2 T. R. 187; 1 R. R. 457; *Pariente v. Lubbock*, 1855, 20 Beav. 588; *Bexwell v. Christie*, 1776, Cowp. 395); to exercise his authority in the usual way, and in accordance with any special customs or usages of the business in which he is employed, except so far as such customs or usages are unreasonable, or inconsistent with the express terms of his authority or instructions (*Wiltshire v. Sims*, 1808, 1 Camp. N. P. 258; 10 R. R. 673; *Mallough v. Barber*, 1815, 4 Camp. N. P. 150; *Solomon v. Barker*, 1862, 2 F. & F. 726); to act, in regard to all matters left to his discretion, with the most perfect good faith, and to the best of his judgment, solely for the benefit of the principal (*Gray v. Haig*, 1854, 20 Beav. 219; *General Exchange Bank v. Horner*, 1869, L. R. 9 Eq. 480; *Pariente v. Lubbock*, 1855, 20 Beav. 588); to keep the money and property of the principal separate from his own money and property, and from that of other persons (*Lupton v. White*, 1808, 15 Ves. Jun. 432; 10 R. R. 94; *Guerreiro v. Peile*, 1820, 3 Barn. & Ald. 616; 22 R. R. 500; *Massey v. Banner*, 1820, 1 Jac. & W. 241; 21 R. R. 150); to keep and preserve, and be constantly ready with, correct accounts of all dealings and transactions in the course of the agency (*Gray v. Haig*, 1854, 20 Beav. 219; *Pearse v. Green*, 1819, 1 Jac. & W. 135; 20 R. R. 258; *Turner v. Burkinshaw*, 1867, L. R. 2 Ch. 488); to produce, whenever reasonably called upon by the principal, or by any proper person



duly authorised by the principal in that behalf, all accounts and documents in his hands concerning the principal's affairs (*Dadswell v. Jacobs*, 1887, 34 Ch. D. 278); to pay over to the principal, on demand, money received to his use (*Harsant v. Blaine*, 1887, 56 L. J. Q. B. 511; *Pearse v. Green*, 1819, 1 Jac. & W. 135; 20 R. R. 258); and to exercise due skill, care, and diligence in the execution of his authority (*Beal v. South Devon Rwy. Co.*, 1864, 3 H. & C. 337).

An agent is not bound to perform a mere gratuitous undertaking; but if he does perform it, he is liable for negligence, or any other breach of duty, in the performance thereof (*Coggs v. Bernard*, 2 Raym. (Ld.) 909; *Balfe v. West*, 1853, 13 C. B. 466; *Elsee v. Gatward*, 1793, 5 T. R. 143).

*Duty to pay over Money received for Principal's Use.*—An agent who receives money for the use of his principal is bound to pay it over to the principal, though the contract or transaction in respect of which it is received be void or illegal. Thus, if a turf commission agent makes a bet on behalf of a principal, and wins it, he is bound to pay over the amount of the winnings, if he actually receives them, although, in consequence of the Gaming Act, 1845, the bet is void, and no action could be maintained for the recovery thereof (*Bridger v. Savage*, 1885, 15 Q. B. D. 363). The Gaming Act, 1892, has not affected this principle (*De Mattos v. Benjamin*, 1894, 63 L. J. Q. B. 248). So, if money is paid to an agent in respect of an illegal transaction, he is bound to pay it over to the principal, provided that the contract of agency is not itself unlawful (*Bousfield v. Wilson*, 1846, 16 Mee. & W. 185; *Farmer v. Russell*, 1798, 1 Bos. & Pul. 296; *Tenant v. Elliott*, 1797, 1 Bos. & Pul. 3; 4 R. R. 755; *Booth v. Hodgson*, 1795, 6 T. R. 405). Where, however, money has been obtained by an agent wrongfully, or has otherwise been paid to him under such circumstances that he is bound to return it, and he returns it accordingly, he is no longer answerable to the principal in respect thereof, because it thereupon ceases to be money received to the principal's use (*Murray v. Mann*, 1848, 2 Ex. Rep. 538; *Shee v. Clarkson*, 1810, 12 East, 507; 11 R. R. 473). Where an agent receives money to the use of two or more principals jointly, it is his duty to account to them jointly, and he is not bound to pay over or account for any part of the money to any of the principals, without the consent of them all, whatever may be the rights or shares of the principals as between themselves (*Hatsall v. Griffith*, 1834, 2 C. & M. 679; *Heath v. Chilton*, 1844, 12 Mee. & W. 632). In accounting for money received to his principal's use, an agent is entitled to take credit for all just allowances (*Dale v. Sollet*, 1767, 4 Burr. 2133), and all sums expended by him with the consent or subsequent acquiescence of the principal, even if they were expended for an unlawful purpose (*Bayntun v. Cattle*, 1833, 1 Moo. & R. 265). Where, however, an agent is authorised to expend money for an unlawful purpose, such authority may be revoked at any time before he has actually paid the money away (*Bone v. Ekless*, 1860, 5 H. & N. 925; *Taylor v. Bowers*, 1876, 1 Q. B. D. 291).

*Duty to exercise due Skill, Care, and Diligence.*—The degree of skill, care, and diligence which an agent is bound to exercise in the execution of his authority depends upon whether he is acting gratuitously or for valuable consideration, and upon the nature of the agency. An agent who acts gratuitously is bound to exercise such skill as he actually possesses, and such care and diligence as he is in the habit of exercising in regard to his own affairs; but he is not liable for mere want of skill, except for the want of such skill as he holds himself out as possessing, or as a person in his situation may reasonably be expected to possess (*Moffatt v. Bateman*, 1869,



L. R. 3 P. C. 115; *Wilson v. Brett*, 1843, 11 Mee. & W. 113; *Whitehead v. Greetham*, 1825, 2 Bing. 464; *Dartnall v. Howard*, 1825, 4 Barn. & Cress. 345). Where a general merchant undertook, without reward, to enter at the custom-house a parcel of goods belonging to A., together with a parcel of his own, and he entered both parcels under a wrong denomination, in consequence of which the goods were seized, it was held that as he had taken the same care of A.'s goods as of his own, and was not of a profession or employment from which skill was necessarily implied, he was not liable to A. for the loss (*Shiells v. Blackburne*, 1789, 1 Black. H. 159; 2 R. R. 750). An agent acting for reward is bound to exercise such a degree of skill, care, and diligence as is usual in the ordinary course of the business in which he is employed, or is reasonably necessary for the proper performance of the duties undertaken by him (*Beal v. South Devon Rwy. Co.*, 1864, 3 H. & C. 337; *Solomon v. Barker*, 1862, 2 F. & F. 726; *Harmer v. Cornelius*, 1858, 5 C. B. N. S. 236; *Massey v. Banner*, 1820, 1 Jac. & W. 241; 21 R. R. 150; *Reeve v. Palmer*, 1859, 5 C. B. N. S. 84). What is the usual or a reasonable degree of skill, care, or diligence is a question of fact, depending upon the nature of the agency, and the other circumstances of the particular case. It is the duty of a patent agent to know the law relating to the practice of obtaining patents (*Lee v. Walker*, 1872, L. R. 7 C. P. 121), and of an insurance broker to know what provisions are usually inserted in policies which he undertakes to effect (*Mallough v. Barber*, 1815, 4 Camp. N. P. 150). So, an insurance broker is bound to exercise reasonable diligence in effecting an insurance which he has undertaken (*Turpon v. Bilton*, 1843, 5 Man. & G. 455; see also *Bousfield v. Cresswell*, 1810, 2 Camp. N. P. 545; 11 R. R. 794), and if he is unable to insure according to his instructions, to give notice of that fact to the principal (*Callander v. Oelricks*, 1839, 5 Bing. N. C. 58). Where a house-agent was paid a commission of 5 per cent. for letting houses, it was left to the jury to say whether he did not undertake to exercise reasonable care to ascertain whether the tenants were solvent, and they found that he did (*Hayes v. Tindall*, 1861, 1 B. & S. 296). On the other hand, it is not the duty of a broker to inspect goods bought by him as such, in order to ascertain whether they are in accordance with the contract, because it is not usual for a broker, in the ordinary course of his business, to do so (*Zwilchenbart v. Alexander*, 1860, 1 B. & S. 234). Nor, where a broker is appointed to act as arbitrator in the event of a dispute between the principals, is he bound to exercise any skill in order to come to a correct conclusion, because it is not part of a broker's ordinary business to act as an arbitrator (*Pappa v. Rose*, 1872, L. R. 7 C. P. 32, 525). See also cases cited *infra*, under *Liability of Agent for Negligence and Breach of Duty*.

*Estoppel of Agent*.—Where goods or chattels are intrusted to an agent by his principal, or an agent acknowledges the title of his principal to goods or chattels in his possession, the agent is not, as a general rule, permitted to deny, as between himself and the principal, that the principal is the owner of the goods or chattels, nor to set up, as against the principal, the title of any third person thereto (*Dixon v. Hammond*, 1819, 2 Barn. & Ald. 310; *Roberts v. Ogilby*, 1821, 9 Price Ex. 269; *Scott v. Crawford*, 1842, 4 Man. & G. 1031; *Zulueta v. Vinent*, 1851, 1 De G., M. & G. 315; *Green v. Maitland*, 1842, 4 Beav. 524). There is, however, an exception to this rule. An agent may set up the title of a third person who has a right to the goods or chattels as against the principal, subject to the following conditions—(1) the agent must not have had notice of the claim of such third person at the time when he received the goods or chattels, and must



not have elected to treat the principal as the owner thereof after receiving such notice (*Ex parte Davies*, 1881, 19 Ch. D. 86); (2) the agent must have delivered up the goods or chattels to such third person, or must defend for him and on his behalf, and by his authority (*Biddle v. Bond*, 1865, 6 B. & S. 225; *Ross v. Edwards*, 1895, 73 L. T. 100; *Rogers v. Lambert*, [1891] 1 Q. B. 318; *Thorne v. Tilbury*, 1858, 3 H. & N. 534).

The possession of property by an agent is deemed to be the possession of the principal, as evidence of title (*Hitchings v. Thompson*, 1850, 5 Ex. Rep. 50; *Last v. Dinn*, 1859, 28 L. J. Ex. 94), and for the purpose of the acquisition of title by the operation of the Statute of Limitations (*Cooper v. De Tastet*, 1829, Taml. 177; *A.-G. v. Corporation of London*, 1849, 2 Mac. & G. 247; *Ward v. Carttar*, 1865, L. R. 1 Eq. 29). An agent who is permitted to occupy premises belonging to the principal can acquire no title by means of such occupation, even if he uses the premises for an independent business of his own (*White v. Bayley*, 1861, 10 C. B. N. S. 227). In *Lyell v. Kennedy*, 1889, 14 App. Cas. 437, where an agent continued, for many years after the death of his principal intestate, to receive the rents of properties belonging to the principal, it was held that he was not entitled to set up the Statute of Limitations, in an action by the assignee of the heir-at-law for the recovery of the properties and an account of the rents and profits. On the other hand, a principal may acquire a good prescriptive title by virtue of the possession of his agent, even as against the agent himself. In *Williams v. Potts*, 1871, L. R. 12 Eq. 149, where an agent received the rents of certain property for more than twenty years, and duly paid them over to the principal, it was held that, in the absence of fraud, the principal had thereby acquired a good prescriptive title, even though the agent was the true owner of the property.

*Duties arising from Fiduciary Nature of the Relationship.*—The relationship of principal and agent is one involving confidence, and it is the duty of every agent to act with the most perfect good faith towards his principal, and not in any way to abuse the confidence reposed in him. If an agent acquires materials or information in the course of his employment, he will not be permitted, even after the termination of the agency, to use such materials or information in any manner prejudicial to the interests of the principal, without the principal's consent (*Robb v. Green*, [1895] 2 Q. B. 315; *Louis v. Smellie*, 1895, 73 L. T. 226; *Lamb v. Evans*, [1893] 1 Ch. 218). If an agent, being employed to purchase property, purchases it on his own behalf, and it is conveyed or transferred to him, he is a trustee thereof for the principal (*Lees v. Nuttall*, 1834, 2 Myl. & K. 819; *Austin v. Chambers*, 1837, 6 Cl. & Fin. 1). As to the agent's right to plead the 7th section of the Statute of Frauds in such a case, see *Bartlett v. Pickersgill*, 1 Cox, 15; 1 R. R. 1; *James v. Smith*, [1891] 1 Ch. 384; *Rochevoucauld v. Boustead*, [1897] 1 Ch. 196. Other duties of an agent arising from the fiduciary character of the relation are to make full and fair disclosure when he has a personal interest in any transaction entered into by him, or when he deals with the principal, and to account for *all* secret benefits and profits acquired in the course or by means of the agency.

*Duty to disclose Personal Interest.*—It is the duty of an agent to use his best endeavours to promote the interests of his principal; and no agent will be permitted to enter into any transaction in which he has a personal interest in conflict with such duty, except with the consent of the principal, given after all the material circumstances, and the exact nature and extent of the interest of the agent, have been fully disclosed to him (*Rothschild v. Brookman*, 1831, 5 Bli. N. S. 165; *Parker v. M'Kenna*, 1874, L. R. 10



Ch. 96; *Aberdeen Rwy. Co. v. Blaikie*, 1854, 2 Eq. Rep. 1281; *Tyrrell v. Bank of London*, 1862, 10 Cl. H. L. 26). An agent for the sale of property is not permitted to purchase it himself, nor is an agent for purchase permitted to buy his own property, or property in which he has an interest, on behalf of the principal, except after a full disclosure to the principal of the circumstances; and it is immaterial whether the price paid or charged is a fair one or not (*Lowther v. Lowther*, 1806, 13 Ves. Jun. 95, 102; *Massey v. Davies*, 1794, 2 Ves. Jun. 317; 2 R. R. 218; *Bentley v. Craven*, 1853, 18 Beav. 75; *Rothschild v. Brookman*, 1831, 5 Bli. N. S. 165; *Great Luxembourg Rwy. Co. v. Magnay*, 1858, 25 Beav. 586). Where any transaction is entered into in violation of this rule, the principal, upon discovery of the circumstances, may repudiate the transaction, or may affirm it and recover from the agent any profit made by him in respect thereof (*Rothschild v. Brookman*, *supra*; *Bentley v. Craven*, *supra*; *Cavendish-Bentinck v. Fenn*, 1886, 12 App. Cas. 652). In *Oliver v. Court*, 1820, 8 Price Ex. 127; 22 R. R. 720, where an auctioneer, who was employed to sell an estate, purchased it himself, the sale was set aside after an interval of thirteen years. In *Salomans v. Pender*, 1865, 3 H. & C. 639, an agent for the sale of land sold it to a company in which he was a shareholder, and it was held that the sale was not binding on the principal, and that, though he affirmed it, he was not liable to pay the agent's commission on the sale. In *Gillett v. Peppercorne*, 1840, 3 Beav. 78, where a stockbroker, who was employed to purchase shares, purchased them from a person who held them as trustee for himself, the transaction was set aside after an interval of many years, without any inquiry as to whether the price was an unfair one. Where an agent has any personal interest in a sale or purchase negotiated by him, it is his duty to disclose all the circumstances, and the exact nature and extent of his interest. It is not sufficient for him to merely disclose that he has an interest, or to make such statements as would put the principal on inquiry. The burden of proving full disclosure lies, in all cases, upon the agent or other person seeking to uphold the transaction in question (*Dunne v. English*, 1874, L. R. 18 Eq. 524; *Ex parte Huth*, *In re Pemberton*, 1840, Mont. & Chit. 667). A custom of a particular trade or business, whereby an agent for sale may purchase the property himself, in the event of his being unable to find a purchaser at an adequate price, is unreasonable, and such a transaction is not binding on the principal, unless he had notice of the custom, and agreed to be bound thereby, at the time when he gave the authority to the agent (*Hamilton v. Young*, 1881, L. R. 7 Ir. 289; *Rothschild v. Brookman*, 1831, 5 Bli. N. S. 165; *De Bussche v. Alt*, 1877, 8 Ch. D. 286). Any custom or usage which has the effect of converting an agent into a principal, or otherwise giving him an interest at variance with his duty, is unreasonable (*Robinson v. Mollett*, 1874, L. R. 7 H. L. 802; *Williamson v. Barbour*, 1877, 9 Ch. D. 529).

*Duty of Agent dealing with Principal.*—It is the duty of an agent, if he enters into any contract or transaction with his principal, or with his principal's representative in interest, to act with the most perfect good faith, and fully disclose all material circumstances, and everything known to him respecting the subject-matter of the contract or transaction which would be calculated to influence the conduct of the principal or his representative in interest; and whenever the validity of any such contract or transaction is in question, the burden of proving that full disclosure was made, and that no advantage was taken by the agent of his position, or of the confidence reposed in him, lies on the agent (*Molony v. Kernan*, 1842, 2 Dr. & War. 31; *Charter v. Trevelyan*, 1842, 11 Cl. & Fin. 714;



*McPherson v. Watt*, 1877, 3 App. Cas. 254; *Savery v. King*, 1856, 5 Cl. H. L. 627; *Collins v. Hare*, 1828, 2 Bli. N. S. 106; *Ward v. Sharp*, 1883, 53 L. J. Ch. 313). In *Gwatkin v. Campbell*, 1854, 1 Jur. N. S. 131, a bank manager, who was permitted to carry on a separate business of his own, made advances for the purposes of such business, upon bills which he did not indorse, and it was held that he must make good to his principals a loss suffered through the insolvency of the parties to the bills, on the ground that he ought not to have granted himself the accommodation without previously disclosing to the principals all the circumstances. So if an agent buys property, or takes a lease, from his principal, or, being employed in the management of trust property, buys part of the property from a *cestui-que trust*, it is his duty to fully disclose to the principal or *cestui-que trust* everything known to him respecting the property which increases its value (*Selsey v. Rhoades*, 1824, 2 Sim. & St. 41; *King v. Anderson*, 1874, 8 Ir. Eq. 147; *Luddy's Trustees v. Peard*, 1886, 33 Ch. D. 500). Where the articles of association of a company provided that the directors might contract with the company upon disclosing their interest, it was held that they must disclose the full extent and exact nature of their interest, not merely that they had an interest (*Imperial Credit Co. v. Coleman*, 1873, L. R. 6 H. L. 189). The right of a principal to rescind or set aside a transaction entered into with his agent, on the ground of want of disclosure or good faith on the part of the agent, may, however, be lost by acquiescence or delay. The principal must take proceedings to enforce his rights within a reasonable time after the circumstances become known to him (*Wentworth v. Lloyd*, 1864, 10 Cl. H. L. 589; *De Montmorency v. Devereux*, 1840, 7 Cl. & Fin. 188; *Flint v. Woodin*, 1852, 9 Hare, 618; *Clanricarde v. Henning*, 1860, 30 L. J. Ch. 865).

*Duty to account for Secret Profits.*—An agent is not permitted, unless with the knowledge and consent of his principal, to acquire any personal benefit or profit in the course or by means of the agency (*Parker v. McKenna*, 1874, L. R. 10 Ch. 96; *Morison v. Thompson*, 1874, L. R. 9 Q. B. 480; *Imperial Credit Co. v. Coleman*, 1873, L. R. 6 H. L. 189). If an agent purchases charges on his principal's estates, or debts owing by the principal, he is deemed to purchase them as trustee for the principal, and is therefore only entitled to recover from the principal the amount actually paid for the charges or debts, with interest (*Reed v. Norris*, 1837, 2 Myl. & Cr. 361, 374; *Carter v. Palmer*, 1841, 8 Cl. & Fin. 657; *Hobday v. Peters*, 1860, 28 Beav. 349). And whenever an agent, in the course or by means of the agency, acquires any benefit or profit without the consent of the principal, such benefit or profit is deemed to be received for the principal's use, and the value or amount thereof must be accounted for and paid over to the principal (*De Bussche v. Alt*, 1877, 8 Ch. D. 286; *Thompson v. Meade*, 1891, 7 T. L. R. 698; *Morison v. Thompson*, 1874, L. R. 9 Q. B. 480; *Kimber v. Barber*, 1872, L. R. 8 Ch. 56). Thus, where a shipmaster, being authorised to employ the ship to the best advantage, and not being able to procure remunerative freight, loaded her with a cargo of his own, it was held that he must account to the owners for the profit made by the sale of the cargo, and not merely for reasonable freight (*Shallcross v. Oldham*, 1862, 2 John. & H. 609; cp. *Kirkham v. Peel*, 1881, 44 L. T. 195). So, if a managing owner of a ship supplies provisions for the ship, he will only be permitted to charge cost prices, unless the other part-owners consent, with a full knowledge of the circumstances, to pay profit prices (*Ritchie v. Couper*, 1860, 28 Beav. 344; see also *Williamson v. Hine*, [1891] 1 Ch. 390). On the same principle, a director of a company is bound to account to the company



for any profit or benefit acquired by him in the course of conducting its business, or by means of his connection with the company, unless it was acquired with the knowledge and sanction of the shareholders (*Gaskell v. Chambers*, 1858, 26 Beav. 360; *General Exchange Bank v. Horner*, 1869, L. R. 9 Eq. 480; *Mann v. Edinburgh Tramway Co.*, 1892, 9 T. L. R. 102; *Archer's case*, [1892] 1 Ch. 322; *Benson v. Heathorn*, 1842, 1 Y. & C. C. 326). It is immaterial that, in acquiring the benefit or profit, the agent incurred a risk of loss (*Williams v. Stevens*, 1866, L. R. 1 P. C. 352), and that the principal has suffered no injury (*Parker v. McKenna*, 1874, L. R. 10 Ch. 96). Where, however, the principal knows that the agent is accustomed to receive remuneration from third persons, and does not choose to inquire what is the amount thereof, he cannot, because he is under a misapprehension as to the amount, claim that any part of the remuneration is a profit acquired without his consent (*Great Western Insurance Co. v. Cunliffe*, 1869, L. R. 9 Ch. 525; *Baring v. Stanton*, 1876, 3 Ch. D. 502).

*Liability of Agent for Negligence and Breach of Duty.*—An agent is liable to make good to his principal any loss suffered in consequence of the agent's omission to exercise such skill, care, and diligence in the performance of the contract of agency as it is his duty to exercise, or in consequence of any other breach of duty on his part, provided that the loss is such as would be likely, in the ordinary course of things, to result from the breach of duty, or is such as, under the circumstances of the particular case, he might reasonably expect to result therefrom (*Cassaboglou v. Gibb*, 1882, 11 Q. B. D. 797; *Fisher v. Val de Travers Co.*, 1876, 1 C. P. D. 511; *Maydew v. Forrester*, 1814, 5 Taun. 615; 15 R. R. 597; *Mainwaring v. Brandon*, 1818, 2 Moo. K. B. 125; 19 R. R. 497). Where an agent was instructed to warehouse the principal's goods at a particular place, and he warehoused a portion of them at another place, where they were destroyed, it was held that the loss was a natural consequence of his disobedience to the instructions, and that he was liable to make it good, though he had not been guilty of negligence (*Lilley v. Doubleday*, 1881, 7 Q. B. D. 510). So, if an agent, being instructed to insure goods, omits to do so, or omits to disclose material facts known to him, in consequence of which the principal fails to recover on the policy, the agent is liable to the same extent as the underwriters would have been if he had duly and effectually insured the goods (*Smith v. Lascelles*, 1788, 2 T. R. 187; 1 R. R. 457; *Smith v. Price*, 1862, 2 F. & F. 748; *Tickel v. Short*, 1750, 2 Ves. 238; *Maydew v. Forrester*, 1814, 5 Taun. 615; 15 R. R. 597). So, where an agent was instructed not to part with the possession of certain goods until they were paid for, and he delivered them to the purchaser, who failed to pay for them, it was held that the agent was liable to the principal for the full value of the goods (*Stearine Co. v. Heintzmann*, 1864, 17 C. B. N. S. 56; see also *Papé v. Westacott*, [1894] 1 Q. B. 272). An auctioneer, however, is not liable for accepting, in disobedience to the instructions of his principal, the highest *bonâ fide* bid at a sale without reserve, because such instructions are unlawful, and it is, therefore, not the duty of the auctioneer to obey them (*Berwell v. Christie*, 1776, Cowp. 395). If an agent pays his principal's money into his own account at the bank, he is answerable for the failure of the banker, though acting gratuitously, because it is his duty to pay it into a separate account (*Wren v. Kirton*, 1805, 11 Ves. Jun. 377; 8 R. R. 174; *Massey v. Banner*, 1820, 1 Jac. & W. 241; 21 R. R. 150).

In *Solomon v. Barker*, 1862, 2 F. & F. 726, a broker had omitted to make an estimate of the value of goods which he was authorised to sell, it being usual in the business to make such an estimate; in



*Stumore v. Breen*, 1886, 12 App. Cas. 698, a shipmaster had signed a bill of lading which was incorrectly dated; and in *Hibbert v. Bayley*, 1860, 2 F. & F. 48, an auctioneer had permitted a purchaser to go away without paying a deposit; and in each case the agent was held liable to the principal in an action for negligence. On the other hand, an agent is not liable for loss incurred, where he has strictly followed the instructions of the principal (*Pariente v. Lubbock*, 1855, 8 De G., M. & G. 5; *Warwicke v. Noakes*, 1790, 1 Pea. 98; 3 R. R. 653), or has acted in accordance with usage, and in the ordinary course of business (*Russell v. Hankey*, 1794, 6 T. R. 12; 3 R. R. 102; *Lambert v. Heath*, 1846, 15 Mee. & W. 486; *Mitchell v. Newhall*, 1846, 15 Mee. & W. 308; *Moore v. Mourgue*, 1776, Cowp. 479), or has exercised his best judgment in a matter of a purely discretionary nature (*Comber v. Anderson*, 1808, 1 Camp. N. P. 523; *Cullerne v. London and Suburban Building Society*, 1890, 25 Q. B. D. 485). Nor, where an agent is clearly authorised to do a particular act, which is in itself imprudent, is he liable for loss suffered by the principal in consequence of the imprudent nature thereof (*Overend v. Gibb*, 1872, L. R. 5 H. L. 480).

An agent is only liable, in an action for breach of duty, to make good such loss as he might reasonably have expected to result from the breach of duty (*In re United Service Co., Johnston's claim*, 1870, L. R. 6 Ch. 212; *Boyd v. Fitt*, 1864, 11 L. T. 280), and it must be a loss which is recognised by law. If an agent is employed to make a wagering or unlawful contract, he is not liable for neglecting to do so, because the principal would be unable to enforce such a contract, and he is therefore not deemed to have suffered any loss in consequence of the breach of duty, and it is immaterial that it is customary in the business to fulfil such a contract without action (*Cohen v. Kittell*, 1889, 22 Q. B. D. 680; *Webster v. De Tastet*, 1797, 7 T. R. 157; 4 R. R. 402).

*Liability of Agent accepting a Bribe.*—Where an agent accepts any money or property in the course of his agency by way of a bribe, he is liable to account for the amount or value thereof as money received for the use of the principal, with interest at the rate of 5 per cent. per annum from the date of the receipt of the bribe, whether he was induced to depart from his duty to the principal or not (*Mayor of Salford v. Lever*, [1891] 1 Q. B. 168; *Phosphate Sewage Co. v. Hartmont*, 1877, 5 Ch. D. 394; *Hay's case*, 1875, L. R. 10 Ch. 593); and if the property has fluctuated in value, it must be accounted for at its highest value while in the possession of the agent (*McKay's case*, 1875, 2 Ch. D. 1; *Pearson's case*, 1877, 5 Ch. D. 336; *Mitcalfe's case*, 1879, 13 Ch. D. 169; *Weston's case*, 1879, 10 Ch. D. 579). Where the agent is induced by the bribe to depart from his duty to the principal, he is also liable, jointly and severally with the person bribing him, to make good the loss suffered by the principal in consequence of the breach of duty, without taking into consideration the amount paid over to the principal as money received to his use (*Mayor of Salford v. Lever*, [1891] 1 Q. B. 168). The acceptance of a bribe by an agent justifies dismissal without notice (*Boston Fishing Co. v. Ansell*, 1888, 39 Ch. D. 339). An agent is not, however, a trustee for his principal in respect of money received as a bribe, and the principal is not entitled to follow it as trust money. The relation between them is that of debtor and creditor, not that of trustee and *cestui-que trust* (*Lister v. Stubbs*, 1890, 45 Ch. D. 1); and the right of the principal to sue for the bribe is barred by the Statute of Limitations, in equity as well as at law, after the expiration of six years from the time when he becomes aware of the bribery (*Metropolitan Bank v. Heiron*, 1880, 5 Ex. D. 319).



*Right of Agent to Commission or Remuneration.*—The right of an agent to commission or remuneration for his services may be founded upon either an express or an implied contract. The mere employment of a commission agent, or other person who is accustomed to undertake agency business for reward, such as an auctioneer, or factor, or broker, is sufficient to raise a presumption of an intention to pay him the usual and customary charges; and a contract to do so will always be implied from such an employment, unless the circumstances are such as to clearly show that, in the particular case, it was not intended that he should receive remuneration (*Miller v. Beale*, 1879, 27 W. R. 403; *Manson v. Baillie*, 1855, 2 Macq. H. L. Cas. 80). A contract to pay remuneration will not, however, be implied merely because services are rendered by an agent, unless the circumstances of the case are such as to indicate an intention to remunerate him (*Taylor v. Brewer*, 1813, 1 M. & S. 290; *Roberts v. Smith*, 1859, 4 H. & N. 315; *Reeve v. Reeve*, 1858, 1 F. & F. 280; cp. *Bryant v. Flight*, 1839, 5 Mee. & W. 114; *Jewry v. Busk*, 1814, 5 Taun. 302).

Where express provision is made by the contract of agency as to the remuneration of the agent, his rights with respect thereto must be ascertained exclusively from the terms of the contract. Thus, where it was provided that an agent should receive commission on "all sales effected or orders executed by him," and by the custom of the trade commission was not payable in respect of bad debts, it was held that he was, nevertheless, entitled to commission upon the sales resulting in bad debts, because the custom was inconsistent with the terms of the contract (*Bower v. Jones*, 1831, 8 Bing. 65). So, if an agent is employed to find a purchaser for property, and it is provided that he shall be paid a certain commission in the event of success, he has no claim for a *quantum meruit*, in the absence of success, because such a claim is excluded by the express contract (*Green v. Mules*, 1861, 30 L. J. C. P. 343; *Barnett v. Isaacson*, 1888, 4 T. L. R. 645; *M'Leod v. Artola*, 1889, 6 T. L. R. 68). So, if it is provided that the commission shall be paid when a certain stage in the negotiations has been reached, as, for instance, when the abstract of conveyance has been delivered, or the purchase-money paid, or the transaction completed, the agent cannot claim the commission until that stage has been reached (*Alder v. Boyle*, 1847, 4 C. B. 635; *Bull v. Price*, 1831, 5 Moo. & P. 2; *Beningfield v. Kynaston*, 1887, 3 T. L. R. 279; *Didcott v. Friesner*, 1896, 11 T. L. R. 187; *Lott v. Outhwaite*, 1893, 10 T. L. R. 76), though he may be entitled to damages for wrongfully preventing him from earning his commission, if the transaction goes off owing to the default of the principal (*Prickett v. Badger*, 1856, 1 C. B. N. S. 296; *Roberts v. Barnard*, 1884, 1 C. & E. 336). Where there is no express agreement as to the remuneration of the agent, and the circumstances of the case are such that a contract to remunerate him may be implied, the extent of the remuneration, and conditions under which it becomes payable, must be ascertained from the custom or usage of the particular trade or business (*Read v. Rann*, 1830, 10 Barn. & Cress. 438; *Broad v. Thomas*, 1830, 7 Bing. 99; *Cohen v. Paget*, 1814, 4 Camp. N. P. 96; *Rucker v. Lunt*, 1863, 3 F. & F. 959; *Baring v. Stanton*, 1876, 3 Ch. D. 502). In the absence of any special custom or usage, the implied contract is to pay reasonable remuneration for the services rendered (*Jewry v. Busk*, 1814, 5 Taun. 302; *Bryant v. Flight*, 1839, 5 Mee. & W. 114).

Where the remuneration of an agent is, by agreement or usage, a commission upon transactions brought about by him, he is only entitled to be paid commission in respect of such transactions as are the direct result of his agency (*Gibson v. Crick*, 1862, 1 H. & C. 142; *Toulmin v. Millar*, 1887,



58 L. T. 96; *Curtis v. Nixon*, 1871, 24 L. T. 706; *Bray v. Chandler*, 1856, 18 C. B. 718; *Bayley v. Chadwick*, 1878, 39 L. T. 429; *Antrobus v. Wickens*, 1865, 4 F. & F. 291). Thus, where it was agreed that an agent should be paid 5 per cent. commission upon the amount of capital introduced by him into a business, and he procured a loan of £10,000, in respect of which he was paid commission, and subsequently the principal and the lender entered into partnership, the lender subscribing a further £4000 by way of capital, it was held that the agent was not entitled to commission in respect of the £4000, because that amount was advanced in consequence of the negotiations for a partnership, with which the agent had nothing to do (*Tribe v. Taylor*, 1876, 1 C. P. D. 505). But it is not necessary that the agent should be acting for the principal at the time of the completion of the transaction. It is sufficient if his introduction is the direct cause of the negotiations from which the transaction ultimately results, though his authority be revoked before completion, and the transaction be completed through the intervention of another agent (*Green v. Bartlett*, 1863, 14 C. B. N. S. 681; *Mansell v. Clements*, 1874, L. R. 9 C. P. 139; *Wilkinson v. Martin*, 1837, 8 Car. & P. 1; cp. *Taplin v. Barrett*, 1889, 6 T. L. R. 30). And where the commission is payable upon the performance of a definite undertaking, and the agent substantially performs that undertaking, he is entitled to be paid the commission, even if the transaction goes off, and the principal acquires no benefit from his services, provided that it does not go off in consequence of the agent's default. Thus, if an agent is employed to procure a loan, and introduces to his principal a person who is able and willing to lend the amount required, so that nothing further remains for the agent to do, he is, in the absence of agreement or custom to the contrary, entitled to his commission, though the negotiations afterwards fall through in consequence of circumstances over which he has no control (*Green v. Lucas*, 1876, 33 L. T. 584; *Fisher v. Drewett*, 1879, 48 L. J. Ex. 32; *Fuller v. Eames*, 1892, 8 T. L. R. 278; cp. *Salter's claim*, 1891, 7 T. L. R. 602; *Peacock v. Freeman*, 1888, 4 T. L. R. 541). So, where it was agreed that an agent should receive commission upon all goods bought through him, it was held that he was entitled to commission upon orders obtained by him and accepted by the principal, though the principal was unable to execute the orders, and therefore acquired no benefit from them (*Lockwood v. Levick*, 1860, 8 C. B. N. S. 603). So, where it is agreed that an agent shall be paid a certain commission in the event of his finding a purchaser for property, it is sufficient, as a general rule, if he procures a complete and binding contract which is accepted by the principal, though the transaction is never completed (*Horford v. Wilson*, 1807, 1 Taun. 12; *Lara v. Hill*, 1863, 15 C. B. N. S. 45; *Hill v. Kitching*, 1846, 3 C. B. 299; *Rimmer v. Knowles*, 1874, 30 L. T. 496; cp. *Clack v. Wood*, 1882, 9 Q. B. D. 276; *Grogan v. Smith*, 1890, 7 T. L. R. 132). See also ESTATE AND HOUSE AGENT.

*Damages for wrongfully preventing Agent from earning Remuneration.*—Where a principal, in breach of the contract of agency, by his own act or default prevents the agent from earning his remuneration, the agent is entitled to damages; and if nothing further remains to be done by the agent under the contract of agency, the measure of damages is the full amount that he would have earned if the principal had duly carried out the contract (*Roberts v. Barnard*, 1884, 1 C. & E. 336; *Harris v. Petherick*, 1878, 39 L. T. 543; *Turner v. Goldsmith*, [1891] 1 Q. B. 544; cp. *Rhodes v. Forwood*, 1876, 1 App. Cas. 256). In *Prickett v. Badger*, 1856, 1 C. B. N. S. 296, an agent was employed to find a purchaser for certain property at a fixed price, and it was agreed that he should be paid commission in



the event of a sale being effected. The agent found a purchaser at the price fixed, but the principal refused to complete the transaction, and it was held that the agent was entitled to recover, by way of damages, the full amount of the commission which he would have earned if the transaction had been duly completed. In *Inchbald v. Western Neilgherry Coffee Co.*, 1864, 17 C. B. N. S. 733, the defendant company had employed the plaintiff, a broker, to dispose of its shares, and had agreed to pay him £100 down, and a further £400 on the allotment of all the shares, and it was held, the company having voluntarily wound up after the disposal of a considerable number of the shares, and thus prevented the plaintiff from earning the £400, that he was entitled to recover such damages for the breach of contract as the jury thought reasonable (see also *Dean and Gibbert's claim*, 1872, 41 L. J. Ch. 476; *Ex parte Clark*, 1869, L. R. 7 Eq. 550; and cp. *Ex parte Maclure*, 1870, L. R. 5 Ch. 737). A principal, however, in the absence of agreement to the contrary, is entitled to revoke the authority of an agent at any time before it is completely exercised, and if he does so, the question whether the agent has a right to be remunerated for the work done prior to the revocation, depends upon the intention of the parties, to be ascertained from the terms of the contract of agency and circumstances of the particular case (*Simpson v. Lamb*, 1856, 17 C. B. 603; *Noah v. Ewen*, 1886, 2 T. L. R. 364).

*Unlawful and Gaming Transactions.*—An agent cannot recover remuneration in respect of any transaction which he knows to be unlawful, or in respect of any gaming or wagering transaction. Thus, a broker cannot recover commission for effecting an illegal insurance (*Allkins v. Jupe*, 1877, 2 C. P. D. 375), or in respect of an illegal sale of offices (*Stackpole v. Erle*, 1761, 2 Wils. 133), whether the claim is founded on an express or an implied promise (*Waldo v. Martin*, 1825, 4 Barn. & Cress. 319; *Parsons v. Thompson*, 1790, 1 Black. H. 322; 2 R. R. 773). This principle, however, only applies where the transaction is obviously unlawful, or is known to be so by the agent (*Haines v. Busk*, 1814, 5 Taun. 521). Prior to the Gaming Act, 1892 (55 Vict. c. 9), the fact that a contract was a gaming or wagering contract constituted no defence to an action for commission in respect thereof, such contracts not being unlawful, but merely void (*Knight v. Fitch*, 1855, 15 C. B. 566). That Act, however, provides that any promise, express or implied, to pay any sum by way of commission, fee, or reward, or otherwise, in respect of any contract or agreement rendered null and void by the Gaming Act, 1845 (8 & 9 Vict. c. 109), or of any services in relation thereto or connection therewith, shall be null and void, and no action shall be brought or maintained to recover any such sum.

*Effect of Misconduct or Breach of Duty.*—An agent has no right of remuneration in respect of any services from which, in consequence of his negligence or other breach of duty, the principal derives no benefit (*Hamond v. Holiday*, 1824, 1 Car. & P. 384; *Hill v. Featherstonhaugh*, 1831, 7 Bing. 569; *Bracey v. Carter*, 1840, 12 Ad. & E. 373; *Dalton v. Irwin*, 1830, 4 Car. & P. 289). In *Denew v. Daverell*, 1813, 3 Camp. N. P. 451, where an auctioneer, who was employed to sell an estate, negligently omitted to insert in the conditions a proviso usually inserted therein, and in consequence of the omission the sale was rendered nugatory, it was held that he was not entitled to any remuneration whatever for his services, though the conditions of the sale had been submitted to the principal, and he had made no objection to them. Nor is an agent entitled to remuneration in respect of anything done by him in excess of his authority, or after the revocation of his authority, unless the principal ratifies it (*Toppin v. Healey*,



1863, 11 W. R. 466; *Marsh v. Jelf*, 1862, 3 F. & F. 234; *Keay v. Fenwick*, 1876, 1 C. P. D. 745). In *Gillow v. Aberdare*, 1893, 9 T. L. R. 12, an agent, who was employed to let or sell a house, having procured a tenant, entered into negotiations for a sale, and subsequently found a purchaser, and it was held that he was not entitled to commission on the sale, because his authority expired as soon as he had let the house. In *Campanari v. Woodburn*, 1854, 15 C. B. 400, where an agent, who was employed to sell a picture on the terms that he should be paid a fixed commission of £100 in the event of success, "no sale, no pay," sold the picture after the death of the principal, it was held that, though the executors confirmed the sale, they were not liable to pay the agreed commission, unless they ratified and recognised the terms of the agent's employment, though they were liable to pay him reasonable remuneration for the services performed. Where an agent enters into a transaction in which he has a personal interest in conflict with his duty, the principal is not liable to pay remuneration in respect of such transaction, even if he elects to affirm it (*Salomans v. Pender*, 1865, 3 H. & C. 639; *Gray v. Haig*, 1854, 20 Beav. 219). The right of an agent to remuneration may be forfeited by his neglect to keep regular and proper accounts, or by his wilful misconduct or breach of duty (*White v. Lincoln*, 1803, 8 Ves. Jun. 363; 7 R. R. 71; *White v. Chapman*, 1815, 1 Stark. N. P. 113; *Hurst v. Holding*, 1810, 3 Taun. 32; 12 R. R. 587).

*Rights of Reimbursement and Indemnity.*—Every agent has by implication of law, as incidental to the contract of agency, a right to be indemnified by the principal against all losses and liabilities, and to be reimbursed all expenses, incurred by him in the lawful and proper performance of the contract of agency (*Thacker v. Hardy*, 1878, 4 Q. B. D. 685; *Toplis v. Grane*, 1839, 5 Bing. N. C. 636; *Pawle v. Gunn*, 1838, 4 Bing. N. C. 445; *Campbell v. Larkworthy*, 1894, 9 T. L. R. 528; *Hooper v. Treffrey*, 1847, 1 Ex. Rep. 17). Thus, if the principal revokes the authority of an agent after he has incurred expenses or liabilities in endeavouring to execute it, the principal must repay the agent the amount of the expenditure, or indemnify him against the liabilities (*Warlow v. Harrison*, 1858, 1 El. & El. 295, 309; *Brittain v. Lloyd*, 1845, 14 Mee. & W. 762; *Simpson v. Lamb*, 1856, 17 C. B. 603). So, if an agent defends an action on his principal's behalf, he is entitled to be indemnified against any damages and costs incurred, provided he was acting within the scope of his authority in defending the action, and the loss was not due to his own negligence or default (*Frixione v. Tagliaferro*, 1855, 10 Moo. P. C. 175; *In re Wells*, 1895, 72 L. T. 359). In *Pettman v. Keble*, 1850, 9 C. B. 701, where an agent, exercising his best judgment, compromised an action brought against him in respect of a contract made on behalf of the principal, it was held that he was entitled to indemnity, though the plaintiff could not, under the circumstances, have succeeded in the action; the principal having had notice of the action, and not having given any instructions as to the course to be pursued. The right of indemnity extends to all liabilities, and not merely actual losses, incurred by the agent. Where a stockbroker incurred liabilities on his principal's behalf, and subsequently paid a composition on the amount of such liabilities, amongst other debts, it was held that the principal must indemnify him to the full extent of the liabilities, although, by a regulation of the Stock Exchange, the broker could not be sued for the balance of his debts without the permission of the committee (*Lacey v. Hill, Crowley's claim*, 1870, L. R. 18 Eq. 182). Where the loss or liability is incurred in pursuance of a regulation, custom, or usage of the particular market or business in which the agent is authorised to deal, the question whether he



is entitled to indemnity or not depends upon whether such regulation, custom, or usage is a reasonable one, or the principal has notice thereof. If the regulation or custom is an unreasonable one, the agent is not entitled to indemnity, unless the principal knew of its existence, and agreed to be bound by it, at the time when he conferred the authority on the agent; if it is a reasonable one, the principal must indemnify the agent, whether he had notice of it or not (*Sentance v. Hawley*, 1863, 13 C. B. N. S. 458; *Harker v. Edwards*, 1887, 57 L. J. Q. B. 147; *Smith v. Reynolds*, 1892, 66 L. T. 808; *Sutton v. Tatham*, 1839, 10 Ad. & E. 27; *Blackburn v. Mason*, 1893, 9 T. L. R. 286; *Robinson v. Mollett*, 1874, L. R. 7 H. L. 802. See also BROKER). An agent who makes advances to or on account of his principal has a right of action, as well as a lien, for such advances; but a *del credere* agent cannot sue for advances which are covered by sums of which he has guaranteed payment to the principal (*Graham v. Ackroyd*, 1852, 10 Hare, 192).

*Unlawful and Gaming Transactions.*—An agent can have no right of reimbursement or indemnity, whether by virtue of an express or an implied promise, in respect of any act or transaction which he knows to be unlawful, or in respect of any transaction rendered null and void by the Gaming Act, 1845. Thus, where an agent expended money on his principal's behalf in purchasing shares in an illegal company, it was held that he was not entitled to recover from the principal the amount so expended, because the transaction was obviously unlawful (*Josephs v. Pebrer*, 1825, 3 Barn. & Cress. 639). So, if a broker effects an illegal insurance, he cannot recover from the principal the amount of the premiums, or any other payment made in respect of the insurance (*Allkins v. Jupe*, 1877, 2 C. P. D. 375). So, if an agent knowingly purchases and pays for smuggled goods on his principal's behalf, he cannot recover the price from the principal, even if the principal obtains possession of the goods (*Ex parte Mather*, 1797, 3 Ves. Jun. 373). This principle, however, applies only when the transaction is obviously, or to the agent's knowledge, unlawful (*Adamson v. Jarvis*, 1827, 4 Bing. 66; *Betts v. Gibbins*, 1834, 2 Ad. & E. 57). With regard to gaming transactions, it was held, prior to the Gaming Act, 1892, that where an agent was employed to make a bet in his own name on the principal's behalf, he had implied authority to pay the amount of the bet if he lost it, and that such authority became irrevocable, as being coupled with an interest, as soon as the bet was made, if the agent would suffer loss of credit in his business or other actual damage in the event of the bet not being paid (*Read v. Anderson*, 1884, 13 Q. B. D. 779). The Gaming Act, 1892 (55 Vict. c. 9), however, provides that any promise, express or implied, to pay any person any sum paid by him under or in respect of any contract or agreement rendered null and void by the Gaming Act, 1845, shall be null and void, and no action shall be brought or maintained to recover any such sum (see *Tatam v. Reeve*, [1893] 1 Q. B. 44; *Knight v. Lee*, [1893] 1 Q. B. 41).

*Losses caused by own Default.*—An agent's right of indemnity does not extend to losses suffered in consequence of his own negligence, default, or breach of duty (*Toplis v. Grane*, 1839, 5 Bing. N. C. 636; *Simpson v. Swan*, 1812, 3 Camp. N. P. 291; 13 R. R. 805; *Frixione v. Tagliaferro*, 1856, 10 Moo. P. C. 175; *Skyring v. Greenwood*, 1825, 4 Barn. & Cress. 281; *Capp v. Topham*, 1805, 6 East, 392; *Lewis v. Samuel*, 1846, 8 Ad. & E. N. S. 685). If an agent enters into any transaction, or does any act, in excess of his authority, he has no right to be indemnified against any losses, or reimbursed any expenses, incurred in respect of such act or transaction, unless it is ratified by the principal (*Coates v. Pacey*, 1892, 8 T. L. R. 474; *Service v.*



*Bain*, 1893, 9 T. L. R. 95; *Barron v. Fitzgerald*, 1840, 6 Bing. N. C. 201). In *Warwick v. Slade*, 1811, 3 Camp. N. P. 127; 13 R. R. 772, a broker was employed to effect a policy of marine insurance, and after the underwriters had signed the slip, but before the policy was effected, the principal revoked his authority. The broker, nevertheless, effected the policy and paid the premiums. It was held that as, in consequence of the Marine Insurance Act, 1867, ss. 7 and 9, the contract of insurance was not binding until the underwriters had subscribed the policy, the broker was not entitled to recover the amount of the premiums from the principal, the policy having been effected and the premiums paid without authority. So, where a broker sold shares on behalf of his principal, and, in consequence of the non-delivery of the shares, the buyer bought other shares at a higher price without having tendered a transfer, and the broker paid the difference, notwithstanding express instructions from the principal not to do so, it was held that the principal was not liable to pay the difference to the broker, because the buyer could not have recovered the amount until a transfer had been tendered by him, and the payment by the broker was therefore unauthorised (*Bowlby v. Bell*, 1846, 3 C. B. 284; *Howard v. Tucker*, 1831, 1 Barn. & Adol. 712). Where an outside broker, being instructed to buy and sell various stocks, without the consent of the principal appropriated to the principal's account certain stocks held by himself, and from time to time sold and repurchased other stocks bought on the principal's behalf, it was held that he was not entitled to recover from the principal any losses in respect of the stocks so appropriated or dealt with in breach of his duty (*Skelton v. Wood*, 1895, 71 L. T. 616). So, where a stockbroker, who was instructed to carry over certain stock to the next settlement, became insolvent and was declared a defaulter before the settling day, in consequence of which the stock was sold at a loss, it was held that the principal was not liable to indemnify the broker against the loss, because it was caused by the broker's own default (*Duncan v. Hill*, 1873, L. R. 8 Ex. 242; see also *Ellis v. Pond*, [1898] 1 Q. B. 426).

*Right of Lien.*—The nature and extent of the lien of an agent upon the goods and chattels of his principal depend upon the terms of the contract of agency, and the usage or custom of the trade or business in which the agent is employed. It may be a general lien in respect of all claims arising in the course of the agency, or a particular lien confined to claims arising in respect of the particular goods or chattels subject to the lien. A general lien can only arise by agreement, either express, or implied from a course of dealing between the principal and agent, or from an established custom or usage (see POSSESSORY LIEN). The lien of an agent, whether general or particular, is confined to claims arising in the course of the agency (*Houghton v. Matthews*, 1803, 3 Bos. & Pul. 485; 7 R. R. 815; *In re Taylor*, [1891] 1 Ch. 590; *In re Galland*, 1885, 31 Ch. D. 296), and, except in the case of the maritime lien of a shipmaster (see MARITIME LIEN), and charging lien of a solicitor (see SOLICITOR), extends only to goods and chattels in the possession of the agent (*Taylor v. Robinson*, 1818, 2 Moo. K. B. 730; *Kinloch v. Craig*, 1790, 3 T. R. 119, 783; 1 R. R. 664). Constructive possession is, however, sufficient (*Bryans v. Nix*, 1839, 4 Mee. & W. 775); and an agreement made for valuable consideration, to hand over a bill of lading to an agent in order that he may have a lien on the goods represented thereby, gives him, in equity, a right to the possession of the goods as against the principal (*Ex parte Barber*, 1843, 3 M. D. & D. G. 174). It is necessary that the possession of the goods or chattels should be obtained by the agent lawfully, and in the same capacity in which the lien is claimed. An agent



has no lien upon property of which he obtains possession by misrepresentations (*Madden v. Kempster*, 1807, 1 Camp. N. P. 12), or of which he obtains possession without the authority of the principal (*Walshe v. Provan*, 1853, 1 Com. L. R. 823; *Gibson v. May*, 1853, 4 De G., M. & G. 512; *Wickens v. Townshend*, 1830, 1 Russ. & M. 361), or in some other capacity than that in which he claims the lien (*Dixon v. Stansfeld*, 1850, 10 C. B. 398; *Muir v. Fleming*, 1823, Dow. & Ry. N. P. 29; *R. v. Sankey*, 1836, 5 Ad. & E. 423; *Champernown v. Scott*, 1821, 6 Madd. 93; *Pelly v. Wathen*, 1849, 1 De G., M. & G. 16). Nor can an agent claim any right of lien which is inconsistent with an agreement between him and the principal (*Walker v. Birch*, 1795, 6 T. R. 258; *Cowell v. Simpson*, 1809, 16 Ves. Jun. 280; 10 R. R. 181; *Bock v. Gorrisen*, 1861, 30 L. J. Ch. 39), or which is inconsistent with the express purpose for which the goods or chattels were intrusted to him (*Brandao v. Barnett*, 1846, 12 Cl. & Fin. 787; *Frith v. Forbes*, 1862, 4 De G., F. & J. 409; *Burn v. Brown*, 1817, 2 Stark. N. P. 272; 19 R. R. 719). An agent's lien is *prima facie* not confined to debts due to him from the principal, but extends to the agent's claim for indemnity against liabilities incurred in the course of the agency, and to all other claims arising in the course of the agency, or in respect of the particular goods, as the case may be (*Foxcraft v. Wood*, 1828, 4 Russ. 487; *In re Fawcus, Ex parte Buck*, 1876, 3 Ch. D. 795; *Hammonds v. Barclay*, 1802, 2 East, 227; *Drinkwater v. Goodwin*, 1775, Cowp. 251; *In re Pavy's Fabric Co.*, 1876, 1 Ch. D. 631).

As to how the lien of an agent may be extinguished or lost, and how far it is effective as against third persons, and as to possessory liens generally, see POSSESSORY LIEN.

#### PRINCIPAL AND THIRD PERSONS.

*Actual and ostensible Authority.*—Third persons who deal with an agent, without notice of the actual limits of his authority, are entitled to assume that his actual authority is coextensive with his ostensible authority. A principal, therefore, whether disclosed or undisclosed (*Watteau v. Fenwick*, [1893] 1 Q. B. 346), is not only bound by such acts as are within the scope of the agent's actual authority, express or implied, but also by every act done by the agent in the course of his employment, which is apparently or ostensibly within the scope of his authority, provided that the person dealing with him has no notice that in doing such act he is exceeding his actual authority (*Hazard v. Treadwell*, 1730, 1 Stra. 506; *Heyworth v. Knight*, 1864, 17 C. B. N. S. 298; *Waller v. Drakeford*, 1853, 1 El. & Bl. 749; *Ex parte Dixon*, 1876, 4 Ch. D. 133). On the other hand, a principal is not bound by any act which is neither apparently nor actually within the scope of the agent's authority (*Stubbing v. Heintz*, 1791, 1 Pea. 66; 3 R. R. 651; *Fitzgerald v. Dressler*, 1859, 7 C. B. N. S. 374), nor by any act which is not done in the course of the agent's employment on his behalf (*McGowan v. Dyer*, 1873, L. R. 8 Q. B. 141). Thus, if an agent is held out by his principal as having authority to enter into a compromise, or do any other act, on the principal's behalf, but is given special instructions not to compromise for less than a certain amount, or not to do such act except on certain conditions, the principal will be bound though the agent disobey such instructions, provided that the person dealing with him has no notice thereof (*Trickett v. Tomlinson*, 1863, 13 C. B. N. S. 663; *Beaufort v. Neeld*, 1845, 12 Cl. & Fin. 248; *National Bolivian Nav. Co. v. Wilson*, 1880, 5 App. Cas. 176, 209; *Smith v. McGuire*, 1858, 3 H. & N. 554). So, where an agent is employed to carry on a business, and it is incidental to the ordinary conduct of such a business to buy goods on credit,



or to accept bills of exchange, the principal is liable in respect of goods bought, or bills accepted, by the agent, although by the contract of agency it was agreed that he should not pledge the principal's credit, the persons dealing with him having no notice of such agreement (*Edmunds v. Bushell*, 1865, L. R. 1 Q. B. 97; *Watteau v. Fenwick*, [1893] 1 Q. B. 346; *Hawken v. Bourne*, 1841, 8 Mee. & W. 703). Otherwise, if the contract or transaction in question is outside the ordinary course of the business, when carried on in the usual way (*Simpson's case*, 1887, 36 Ch. D. 532).

Where the act done by the agent is not within the usual scope of the authority of such an agent, the principal is not bound, unless the agent was in fact authorised to do the act (*Xenos v. Wickham*, 1866, L. R. 2 H. L. 296). Thus, an insurance company is not bound by a contract to grant a policy, made without its authority by a local agent, nor by the unauthorised acceptance by such an agent of a premium after the time for payment of such premium has expired (*Linford v. Provincial Insurance Co.*, 1864, 34 Beav. 291; *Acey v. Fernie*, 1840, 7 Mee. & W. 151; cp. *Wing v. Harvey*, 1854, 5 De G., M. & G. 265; *In re Economic Fire Office*, 1896, 12 T. L. R. 142). So, if a stockbroker sells stock on credit, the principal is not bound, unless he expressly authorised a sale on credit (*Wiltshire v. Sims*, 1808, 1 Camp. N. P. 258; 10 R. R. 673). So, if it is usual in the particular trade or business to impose a certain restriction or limitation on the authority of an agent, and such a restriction or limitation is imposed in the particular case, the principal is not bound by any act of the agent done in contravention thereof (*Daun v. Simmins*, 1879, 41 L. T. 783; *Baines v. Ewing*, 1866, L. R. 1 Ex. 320). Where, however, an agent was authorised, in cases of emergency, to borrow money on exceptional terms outside the ordinary course of business, it was held that a person lending money to the agent on such exceptional terms was not bound to inquire whether, in the particular case, the emergency had arisen, provided he acted in good faith, and without notice that the agent was departing from the terms of his authority (*Montaigniac v. Shitta*, 1890, 15 App. Cas. 347; see also *Bryant v. Quebec Bank*, [1893] App. Cas. 179).

*Doctrine of "Holding out."*—If a person by his conduct represents, or permits it to be represented, that another person is his agent, he will not be permitted to deny the agency with respect to any person dealing with the ostensible agent on the faith of any such representation (*Maddick v. Marshall*, 1864, 17 C. B. N. S. 829; *Summers v. Solomon*, 1857, 26 L. J. Q. B. 301). Thus, where a purchaser of hemp had the hemp transferred in the wharfinger's books into the name of the broker who effected the purchase, and whose ordinary course of business it was to buy and sell hemp, it was held that the purchaser was bound by an unauthorised sale of the hemp by the broker, and by his receipt of the price, because, by permitting the broker to have the custody of the hemp, he had held him out as having authority to sell it and receive the proceeds (*Pickering v. Busk*, 1812, 15 East, 38; 13 R. R. 364; *Dyer v. Pearson*, 1824, 3 Barn. & Cress. 38). So, if A. permits B. on several occasions to buy goods on his credit from C., and pays for them, and C. on a subsequent occasion supplies goods to B. on A.'s credit, B. having in fact been previously given the money to pay for the goods, or having no authority to buy them on A.'s behalf, it is a question of fact whether A. by his conduct held out B. as having authority to buy the goods on his credit, and if he did, he is liable to C. for the price (*Hazard v. Treadwell*, 1730, 1 Stra. 506; *Todd v. Robinson*, 1825, 1 Ry. & M. 217; *Gilman v. Robinson*, 1825, 1 Ry. & M. 226; *Trueman v. Loder*, 1840, 11



Ad. & E. 589; *Llewellyn v. Winckworth*, 1845, 13 Mee. & W. 598; *Prescott v. Flynn*, 1832, 9 Bing. 19). On the same principle, a company is bound by the acts of *de facto* directors, though they have not been properly appointed, provided that the persons dealing with them act in good faith and without notice of any irregularity (*Mahony v. East Holyford Mining Co.*, 1875, L. R. 7 H. L. 869; *In re County Life Assurance Co.*, 1870, L. R. 5 Ch. 288; *Biggerstaff v. Rowall's Wharf*, [1896] 2 Ch. 93).

*Factors Act.*—The Factors Acts are a series of statutes passed for the protection of persons dealing in good faith with factors and other mercantile agents intrusted with the possession of goods, or of the documents of title to goods, and not having notice of the extent of the agent's authority. The former enactments were all repealed, and their provisions consolidated and amended, by the Factors Act, 1889, which is now, therefore, the only statute in force on the subject. For the purposes of the Act the expression "mercantile agent" means a mercantile agent having in the customary course of his business as such agent authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods; the expression "goods" includes wares and merchandise (but not certificates of stock, *Freeman v. Appleyard*, 1862, 32 L. J. Ex. 175); the expression "document of title" includes any bill of lading, dock warrant, warehouse-keeper's certificate, and warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by indorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented; the expression "pledge" includes any contract pledging, or giving a lien or security on, goods, whether in consideration of an original advance or of any further or continuing advance or of any pecuniary liability (see *Jewan v. Whitworth*, 1866, L. R. 2 Eq. 692; *Sheppard v. Union Bank*, 1862, 7 H. & N. 661; *Portalis v. Tetley*, 1867, L. R. 5 Eq. 140); and a person is deemed to be in possession of goods or of the documents of title to goods, where the goods or documents are in his actual custody, or are held by any other person subject to his control or for him or on his behalf (s. 1).

Sec. 2 provides that—(1) Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of the Act, be as valid as if he were expressly authorised by the owner of the goods to make the same; provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same. (2) Where a mercantile agent has, with the consent of the owner, been in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition, which would have been valid if the consent had continued, shall be valid notwithstanding the determination of the consent. (3) Where a mercantile agent has obtained possession of any documents of title to goods by reason of his being or having been, with the consent of the owner, in possession of the goods represented thereby, or of any other documents of title to the goods, his possession of the first-mentioned documents shall, for the purposes of the Act, be deemed to be with the consent of the owner. (4) For the purposes of the Act the consent of the owner shall be presumed in the absence of evidence to the contrary.

Sec. 3 provides that a pledge of the documents of title to goods shall be



deemed to be a pledge of the goods. Sec. 4, that where a mercantile agent pledges goods as security for a debt or liability due from the pledgor to the pledgee before the time of the pledge, the pledgee shall acquire no further right to the goods than could have been enforced by the pledgor at the time of the pledge. Sec. 5, that the consideration necessary for the validity of a sale, pledge, or other disposition, of goods, in pursuance of the Act, may be either a payment in cash, or the delivery or transfer of other goods, or of a document of title to goods, or of a negotiable security, or any other valuable consideration; but where goods are pledged by a mercantile agent in consideration of the delivery or transfer of other goods, or of a document of title to goods, or of a negotiable security, the pledgee shall acquire no right or interest in the goods so pledged, in excess of the value of the goods, documents, or security when so delivered or transferred in exchange. Sec. 6, that for the purposes of the Act an agreement made with a mercantile agent through a clerk or other person authorised in the ordinary course of business to make contracts of sale or pledge on his behalf shall be deemed to be an agreement with the agent.

Sec. 7 provides that where the owner of goods has given possession of the goods to another person for the purpose of consignment or sale, or has shipped the goods in the name of another person, and the consignee of the goods has not had notice that such person is not the owner of the goods, the consignee shall, in respect of advances made to or for the use of such person, have the same lien on the goods as if such person were the owner of the goods, and may transfer any such lien to another person; but nothing in this section shall limit or affect the validity of any sale, pledge, or disposition by a mercantile agent.

Secs. 8, 9, and 10 refer to dispositions by sellers and buyers of goods, and are reproduced in the Sale of Goods Act, 1893. See SALE OF GOODS.

Sec. 11 provides that for the purposes of the Act, the transfer of a document may be by indorsement, or, where the document is by custom or by its express terms transferable by delivery, or makes the goods deliverable to bearer, then by delivery. Sec. 12, that nothing in the Act shall authorise an agent to exceed or depart from his authority as between himself and his principal, or exempt him from any liability, civil or criminal, for so doing; or shall prevent the owner of goods from recovering the goods from an agent or his trustee in bankruptcy at any time before the sale or pledge thereof, or shall prevent the owner of goods pledged by an agent from having the right to redeem the goods at any time before the sale thereof, on satisfying the claim for which the goods were pledged, and paying to the agent, if by him required, any money in respect of which the agent would by law be entitled to retain the goods or the documents of title thereto, or any of them, by way of lien as against the owner, or from recovering from any person with whom the goods have been pledged, any balance of money remaining in his hands as the produce of the sale of the goods, after deducting the amount of his lien; or shall prevent the owner of goods sold by an agent from recovering from the buyer the price agreed to be paid for the same, or any part of that price, subject to any right of set-off on the part of the buyer against the agent. Sec. 13, that the provisions of the Act shall be construed in amplification, and not in derogation, of the powers exercisable by an agent independently of the Act.

The Factors Act applies only to dispositions made by mercantile agents, and made in the ordinary course of their business as such agents. Where a wine merchant's clerk, who was permitted to have the possession of



warrants for wine belonging to his master, fraudulently pledged the warrants, it was held that the pledge was not protected by the Factors Acts, because the clerk was not a mercantile agent within the meaning of the Acts (*Lamb v. Attenborough*, 1862, 1 B. & S. 831). So, where an agent, who was employed on commission to sell jewellery by retail, fraudulently pledged some of the jewellery with a pawnbroker, it was held that the transaction was not within the Factors Act, because the pledge was not made in the ordinary course of the business of a mercantile agent (*Hastings v. Pearson*, [1893] 1 Q. B. 62). So, where advances were made upon the furniture in a house which an agent occupied with the consent of the owner of the furniture, the person making the advances believing the agent to be the owner thereof, it was held that the transaction was not within the scope of the Factors Acts then in force (*Wood v. Rowcliffe*, 1846, 6 Hare, 191). Nor does the Act apply unless the agent obtains or has possession of the goods or documents of title with the consent of the owner (see *Vaughan v. Moffat*, 1868, 38 L. J. Ch. 144). As to when a person is deemed not to have acted in good faith and without notice that the agent has not authority to make the disposition, see *Gobind Chunder Sein v. Ryan*, 1861, 9 Moo. Ind. App. 140; *Navulshaw v. Brownrigg*, 1852, 2 De G., M. & G. 441; *Learoyd v. Robinson*, 1844, 12 Mee. & W. 745.

*Dealings with Money and Negotiable Securities.*—Where an agent pays or negotiates money or negotiable securities for valuable consideration, and the person taking the same acts in good faith, and without notice of any want of authority on the part of the agent, such payment or negotiation is as valid and binding on the owner of the money or securities as if it had been made by his express authority; and for this purpose an antecedent debt or liability of the agent is a sufficient valuable consideration (*London Joint-Stock Bank v. Simmons*, [1892] App. Cas. 201; *Goodwin v. Roberts*, 1876, 1 App. Cas. 476; *Rumball v. Metropolitan Bank*, 1877, 2 Q. B. D. 194). This is an instance of the application of the wider rule of law, that every person who takes money or a negotiable instrument for valuable consideration and in good faith, and who has no notice of any defect in the title of the person from whom he takes it, acquires a good title thereto. A person is deemed to act in good faith, within the meaning of this rule, if he in fact acts honestly, whether he acts negligently or not (Bills of Exchange Act, 1882, s. 90; *Jones v. Gordon*, 1877, 2 App. Cas. 616). In *London Joint-Stock Bank v. Simmons*, [1892] App. Cas. 201, a broker fraudulently pledged with his banker negotiable securities belonging to various principals, as security for an advance to himself, the banker taking them in good faith, but without making any inquiry as to whether the securities were the property of the broker, or whether he had authority to pledge them, and it was held that the principals were bound by the pledge (cp. *Sheffield v. London Joint-Stock Bank*, 1888, 13 App. Cas. 333, where a money-lender pledged securities deposited with him by his customers). In *Marten v. Rocke*, 1885, 53 L. T. 946, where an auctioneer, whose account at the bank was overdrawn, paid in the proceeds of certain sales, it was held that the banker was entitled, as against the principal, to retain in payment of the overdraft the amounts so paid in, though the banker knew that the moneys were substantially the proceeds of sales. Otherwise, if the auctioneer had, to the knowledge of the banker, been committing a breach of trust in paying the moneys into his own account.

*Notice of Want of Authority.*—No act done by an agent beyond the scope of his actual authority is binding on the principal with respect to any person having notice that in doing such act the agent was exceeding or



departing from his authority. Thus, if an agent pledges goods upon which he has a lien, to a person who has notice that he has no authority to pledge them, the transaction is not protected by the Factors Act, and the pledgee has no right to retain the goods, as against the principal, even to the extent of the lien of the agent (*McCombie v. Davies*, 1805, 7 East, 5; 8 R. R. 534; *Daubigny v. Duval*, 1794, 5 T. R. 604). This principle extends to cases where an agent deals in an unauthorised manner with money or negotiable instruments intrusted to him; and a restrictive indorsement upon a negotiable instrument operates as notice to all persons taking it, that the holder has no authority to deal with it or its proceeds in a manner inconsistent with the terms of the indorsement (*Litt v. Martindale*, 1856, 18 C. B. 314; *Sigourney v. Lloyd*, 1828, 8 Barn. & Cress. 622; *Treuttel v. Barandon*, 1817, 8 Taun. 100; 19 R. R. 472; *Steele v. Stuart*, 1866, 14 L. T. 620; *Evans v. Kymer*, 1830, 1 Barn. & Adol. 528). A signature by procuration on a bill of exchange, promissory note, or cheque operates as notice that the agent has but a limited authority to sign, and the principal is only bound by such signature if the agent in so signing was acting within the actual limits of his authority (Bills of Exchange Act, 1882, s. 25; *Alexander v. Mackenzie*, 1848, 6 C. B. 766; *Stagg v. Elliott*, 1862, 12 C. B. N. S. 373; cp. *Bryant v. Quebec Bank*, [1893] App. Cas. 179; *Smith v. McGuire*, 1858, 3 H. & N. 554).

*Admissions of Agent.*—A statement or representation made by an agent is admissible in evidence against the principal, if it was made with the express or implied authority of the principal, or if it was made in the ordinary course of the agent's employment on the principal's behalf, and has reference to some matter or transaction upon which he was employed at the time when the statement or representation was made (*Williams v. Innes*, 1808, 1 Camp. N. P. 364; 10 R. R. 702; *Hood v. Reeve*, 1828, 3 Car. & P. 532; *Standage v. Creighton*, 1832, 5 Car. & P. 406; *Lishman v. Christie*, 1887, 19 Q. B. D. 333; *Biggs v. Lawrence*, 1789, 3 T. R. 454; *Marshall v. Cliff*, 1815, 4 Camp. N. P. 133). But an unauthorised statement or representation of an agent is not evidence against the principal if it was not made in the ordinary course of his employment on the principal's behalf (*Schumack v. Lock*, 1825, 10 Moo. K. B. 39; *Garth v. Howard*, 1832, 1 Moo. & S. 628; *Meredith v. Footner*, 1843, 11 Mee. & W. 202; *Whitehouse v. Abberley*, 1845, 1 Car. & Kir. 642), or if it has reference to some matter or transaction upon which the agent was not employed at the time when the statement or representation was made (*Fairlie v. Hastings*, 1803, 10 Ves. Jun. 123; *Peto v. Hague*, 1804, 5 Esp. 134; *Allen v. Denstone*, 1839, 8 Car. & P. 760; *Wagstaff v. Wilson*, 1832, 4 Barn. & Adol. 339; *Snowball v. Goodriche*, 1833, 4 Barn. & Adol. 541). In *Kirkstall Brewery Co. v. Furness Rwy. Co.*, 1874, L. R. 9 Q. B. 468, the question was whether a parcel sent by railway had been stolen by one of the company's servants, and it was held that a statement made by the stationmaster to the police as to the absconding of a porter was admissible in evidence against the company, the statement having been made in the ordinary course of the stationmaster's duty. On the other hand, where a railway company was sued for not delivering certain goods within a reasonable time, and a servant of the company, a week after the alleged cause of action had arisen, in answer to a question as to why he had not sent on the goods, had stated that he had forgotten them, it was held that the admission was not evidence against the company, because it concerned a bygone transaction, upon which the servant was not employed at the time when the admission was made (*Great Western Rwy. Co. v. Willis*, 1865,



18 C. B. N. S. 748). If an agent is employed to pay workmen for work done, a promise by him to pay is an admission which can be used against the principal as evidence that the money is due; and such a promise, provided it is in writing and signed by the agent, interrupts the operation in the principal's favour of the Statute of Limitations (*Burt v. Palmer*, 1804, 5 Esp. 145; 9 Geo. IV. c. 14, s. 6; 19 & 20 Vict. c. 97, s. 13). So, a part-payment made by an agent in the ordinary course of his employment interrupts the operation of the statute (*Jones v. Hughes*, 1850, 5 Ex. Rep. 104; cp. *Watson v. Woodman*, 1875, L. R. 20 Eq. 721; *Linsell v. Bonsor*, 1835, 2 Bing. N. C. 241). So, if a wife carries on a business on her husband's behalf, an admission by her as to the state of an account for goods supplied to such business is evidence against the husband; and a written and signed promise by her to pay such an account deprives him of the benefit of the Statute of Limitations (*Anderson v. Sanderson*, 1817, 2 Stark. N. P. 204; 19 R. R. 703; *Emerson v. Blonden*, 1794, 1 Esp. 142; *Paethorp v. Furnish*, 1796, 2 Esp. 511; cp. *Meredith v. Footner*, 1843, 11 Mee. & W. 202). On the other hand, where a secretary of a tramway company represented that certain money was due from the company, it was held that the company was not bound by the representation, because it was not in the ordinary course of the secretary's employment to make any such representation on the company's behalf (*Barnett v. South London Tram Co.*, 1887, 18 Q. B. D. 815). Statements and reports made by an agent to his principal concerning the principal's affairs are not admissions which can be used by third persons as evidence against the principal (*In re Devala Co., Ex parte Abbott*, 1883, 22 Ch. D. 593; *Langhorn v. Allnutt*, 1812, 4 Taun. 511; 13 R. R. 663; *Reyner v. Pearson*, 1812, 4 Taun. 662; *Kahl v. Jansen*, 1812, 4 Taun. 565). It seems, however, that on this point a contrary practice prevails in the Admiralty Division (see *The Solway*, 1885, 10 P. D. 137, where it was held that a letter from a shipmaster to the owners was evidence of the facts therein stated against the owners).

*Notice to Agent.*—Where knowledge is acquired by an agent in the course of his agency, of any facts or circumstances material to the transaction or business in respect of which he is employed, the principal is, as a general rule, deemed to have notice of such facts or circumstances, provided that they are of such a nature that it is the duty of the agent to communicate them to him (*Attwood v. Small*, 1838, 6 Cl. & Fin. 232; *Tanham v. Nicholson*, 1872, L. R. 5 H. L. 561; *Graves v. Legg*, 1857, 2 H. & N. 210; *Baldwin v. Casella*, 1872, L. R. 7 Ex. 325; *Brewin v. Briscoe*, 1859, 2 El. & El. 116). Thus, where an agent of an insurance company negotiated a contract of insurance, it was held that the knowledge of the agent that the assured had lost the sight of an eye was equivalent to notice to the company of that fact (*Bawden v. London, etc., Assurance Co.*, [1892] 2 Q. B. 534). So, where a broker bought goods from a factor, it was held that the principal for whom the broker acted must be deemed to have notice that the factor was not selling his own goods, the broker being aware of that fact (*Dresser v. Norwood*, 1864, 17 C. B. N. S. 466). So, where a ship was driven on a rock and damaged, and the master afterwards wrote a letter to the owners, but did not mention the fact that the ship had been damaged, it was held that the owners must be deemed to have had notice of the fact from the time of the receipt of the letter, because it was the duty of the master to have communicated it (*Gladstone v. King*, 1813, 1 M. & S. 35; see also *Proudfoot v. Montefiore*, 1867, L. R. 2 Q. B. 511; *Fitzherbert v. Mather*, 1785, 1 T. R. 12). On the other hand, where a broker, who was employed to effect an insurance, acquired knowledge of a material fact,



which he did not communicate to his principal, it was held that his knowledge did not operate as notice to the principal of such fact, so as to invalidate a policy subsequently effected by another broker in respect of the same risk, because the employment of a broker to effect an insurance does not make it his duty to communicate material facts coming to his knowledge to the principal, but only to the insurers (*Blackburn v. Vigors*, 1887, 12 App. Cas. 531).

An exception to the general rule, that knowledge acquired by an agent, as such, is imputed to the principal, prevails where the agent is a party to the commission of a fraud upon the principal, the success of which requires the concealment of the facts or circumstances in question (*Cave v. Cave*, 1880, 15 Ch. D. 639; *Kennedy v. Green*, 1834, 3 Myl. & K. 699; *Waldy v. Gray*, 1875, L. R. 20 Eq. 238; cp. *Rolland v. Hart*, 1871, L. R. 6 Ch. 678; *Atterbury v. Wallis*, 1856, 25 L. J. Ch. 792; *Boursot v. Savage*, 1866, L. R. 2 Eq. 234). So, where the directors of a company took part in the commission of a misfeasance against the company, it was held that their knowledge did not operate as notice to the company of the misfeasance (*In re Fitzroy Bessemer Steel Co.*, 1844, 50 L. T. 144). The mere fact that the agent has an interest in suppressing his knowledge is not, however, sufficient to prevent such knowledge from being imputed to the principal, if it is the duty of the agent to communicate it (*Thompson v. Cartwright*, 1863, 33 Beav. 178; *Rolland v. Hart*, *supra*; *Bradley v. Riches*, 1878, 9 Ch. D. 189).

Where the facts coming to the knowledge of the agent are not material to the business for which he is employed (*Wyllie v. Pollen*, 1863, 32 L. J. Ch. 782; *Brittain v. Brown*, 1871, 24 L. T. 504; *Powles v. Page*, 1846, 3 C. B. 16; *Tate v. Hyslop*, 1885, 15 Q. B. D. 368; *Ex parte Warren*, 1885, 1 T. L. R. 430), or they come to his knowledge otherwise than in the course of his employment on the principal's behalf (*Société Générale de Paris v. Tramways Union Co.*, 1884, 14 Q. B. D. 424; *Ex parte Boulton*, 1857, 1 De G. & J. 163), the knowledge of the agent does not operate as notice to the principal of such facts. The third section of the Conveyancing Act, 1882 (45 & 46 Vict. c. 39), provides, in favour of purchasers of property for valuable consideration, that a purchaser shall not be prejudicially affected by notice of any instrument, fact, or thing, unless it is within his own knowledge, or would have come to his knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him; or in the same transaction with respect to which a question of notice to the purchaser arises, it has come to the knowledge of his counsel, as such, or of his solicitor, or other agent, as such (see *In re Cousin's Trusts*, 1886, 31 Ch. D. 671), or would have come to the knowledge of his solicitor, or other agent, as such, if such inquiries and inspections had been made as ought reasonably to have been made by the solicitor or other agent.

*Liability of Principal on Agent's Contracts.*—A contract made by an agent is, as a general rule, deemed in law to be the contract of the principal by whose authority it is made. A principal, therefore, is generally liable to be sued directly on any contract duly made on his behalf, unless his liability is excluded by the express terms of the contract. This principle applies whether the agent by the contract pledges his own personal credit or not, and whether the principal be disclosed or undisclosed, except in the case of contracts by deed, bills of exchange, promissory notes, and cheques. If the agent contracts personally, the other contracting party may elect to charge either the principal or the agent, but cannot charge them both, on the



contract (*Paterson v. Gandasequi*, 1812, 15 East, 62; 13 R. R. 368). Thus, where a wife carried on a business in her own name on behalf of her husband, and in her own name ordered goods for the purpose of such business, it was held that the husband was liable for the price of the goods (*Petty v. Anderson*, 1825, 3 Bing. 170). So, where an agent buys goods in his own name, and the seller debits him with the price, not knowing that he is acting on behalf of a principal, the seller, upon discovering the principal, may elect to sue either the principal or the agent for the price of the goods (*Thomson v. Davenport*, 1829, 9 Barn. & Cress. 78; *Paterson v. Gandasequi*, 1812, 15 East, 62; 13 R. R. 368; *Campbell v. Hicks*, 1858, 28 L. J. Ex. 70). If the contract is made by the agent in his own name, parol evidence is admissible to show who is the real principal, in order to charge him thereon, even though the contract be in writing, such evidence not being inconsistent with the terms of the contract (*Morris v. Wilson*, 1859, 5 Jur. N. S. 168; *Calder v. Dobell*, 1871, L. R. 6 C. P. 486; *Trueman v. Loder*, 1840, 11 Ad. & E. 589; *Wilson v. Hart*, 1817, 7 Taun. 295). The liability of the principal may, however, be excluded by the terms of the contract. Where the managing part-owner of a ship became a member of a mutual insurance association, and insured the ship under the rules and regulations of such association, and by such rules and regulations the liability for contributions in the nature of premiums was confined to members of the association, it was held that the other part-owners, not being members, could not be sued as undisclosed principals for contributions due in respect of the policy, even if the managing owner failed to pay them, because the liability of the principals was excluded by the terms of the contract (*U. K. Mutual S.S. Association v. Nevill*, 1887, 19 Q. B. D. 110). Otherwise, if the liability had been thrown on the persons assured, without reference to whether they were members or not, or if it had been provided that the persons assured should be liable as if they were members (*Ocean Iron S.S. Insurance Association v. Leslie*, 1889, 22 Q. B. D. 722; *Great Britain, etc., Insurance Association v. Wyllie*, 1889, 22 Q. B. D. 710).

*Foreign Principals.*—An exception to the general rule as to the liability of a principal upon contracts made on his behalf, prevails where the principal is a foreigner. A home agent has *prima facie* no authority to directly pledge the credit of his foreign principal. A foreign principal, therefore, is not liable to be sued on a contract made by his agent in England, unless it is proved that the agent was authorised to establish privity of contract between such principal and the other contracting party, and it clearly appears from the terms of the contract or from the surrounding circumstances that it was the intention of the agent and of the other contracting party that the principal should be liable on the contract (*Smyth v. Anderson*, 1849, 7 C. B. 21; *Paterson v. Gandasequi*, 1812, 15 East, 62; *Malcolm v. Hoyle*, 1893, 63 L. J. Q. B. 1; *Die Elbinger v. Claye*, 1873, L. R. 8 Q. B. 313; *Hutton v. Bulloch*, 1874, L. R. 9 Q. B. 572).

*Liability on Bills, Notes, and Cheques.*—The doctrine of the liability of an undisclosed principal does not apply to bills of exchange, promissory notes, or cheques (*Ex parte Rayner*, 1868, 17 W. R. 64; *Ducarrey v. Gill*, 1830, Moo. & M. 450). Signature is essential to liability on such an instrument (Bills of Exchange Act, 1882, s. 23), and in determining whether a signature on a bill of exchange is that of the principal or that of the agent by whose hand it is written, the construction most favourable to the validity of the instrument is adopted (*ibid.* s. 26 (2)). And no person can be liable as the acceptor of a bill, except the person to whom it is addressed (*Polhill v. Walter*, 1832, 3 Barn. & Adol. 114; *Davis v. Clarke*, 1844, 6 Ad. & E. N. S.



16). If, therefore, a bill is addressed to a principal, and it is accepted by his authority, the principal is liable as acceptor, whether the acceptance is in his name or in that of the agent (*Lindus v. Bradwell*, 1848, 5 C. B. 583; *Jenkins v. Morris*, 1847, 16 Mee. & W. 877; *Okell v. Charles*, 1876, 34 L. T. 822). If, on the other hand, a bill is addressed to an agent, the name of the principal not being mentioned as drawee, the principal is not liable as acceptor, even if it is accepted in his name and by his authority (*Polhill v. Walter*, 1832, 3 Barn. & Adol. 114). With regard to liability as drawer or indorser of a bill, note, or cheque, or as maker of a note, the rule is a simple one. If the name of the principal is signed, or the signature is expressed to be made on his behalf, by a duly authorised agent, the principal is liable (*Furze v. Sharwood*, 1841, 2 Ad. & E. N. S. 388; *Aggs v. Nicholson*, 1856, 1 H. & N. 165). But he is not liable unless his name appears as the contracting party (*Serrell v. Derbyshire Rwy. Co.*, 1850, 9 C. B. 811; *Ducarrey v. Gill*, 1830, Moo. & M. 450).

As to the liability of a principal to be sued on a deed executed on his behalf, see POWER OF ATTORNEY.

*Discharge of Principal by Election to charge Agent.*—A principal may be discharged from liability upon a contract made on his behalf, by the election of the other contracting party to give exclusive credit to the agent who made the contract. If an agent enters into a contract in such terms that he is personally liable thereon, and the other contracting party does not know who the principal is, such party may, upon discovering the principal, sue him on the contract, though he originally gave exclusive credit to the agent in the belief that he was contracting on his own behalf, provided that a judgment on the contract has not in the meantime been obtained against the agent (*Thomson v. Davenport*, 1829, 9 Barn. & Cress. 78; *Paterson v. Gandasequi*, 1812, 15 East, 62; 13 R. R. 368; *Waring v. Farenck*, 1807, 1 Camp. N. P. 85; 10 R. R. 638; *Campbell v. Hicks*, 1858, 28 L. J. Ex. 70; *Bottomley v. Nuttall*, 1858, 5 C. B. N. S. 122). But if the other contracting party knows at the time when the contract is made, or subsequently discovers, who the principal is, and notwithstanding such knowledge or discovery, elects to give exclusive credit to the agent, he cannot, after having made his election, change his mind, and charge the principal on the contract (*Addison v. Gandasequi*, 1812, 4 Taun. 574; 13 R. R. 689; *Paterson v. Gandasequi*, 1812, 15 East, 62; 13 R. R. 368; *Bentley v. Griffin*, 1814, 5 Taun. 356; *Metcalf v. Shaw*, 1811, 3 Camp. N. P. 22; 13 R. R. 740). For this purpose there must be actual knowledge who the principal is. The knowledge of an agent or servant is not sufficient (*Dunn v. Newton*, 1884, 1 C. & E. 278). Where a judgment is obtained against the agent, such judgment, though unsatisfied, is, while it subsists, a bar to any proceedings on the contract against the principal (*Priestley v. Fernie*, 1865, 3 H. & C. 977; *Kendall v. Hamilton*, 1879, 4 App. Cas. 504); but if the other contracting party, when he obtained the judgment, did not know that there was a principal, or did not know who the principal was, he may, upon getting the judgment set aside, sue the principal on the contract (*Partington v. Hawthorne*, 1888, 52 J. P. 807). Except where the agent is sued to judgment, which is conclusive evidence in point of law of an election to give exclusive credit to him (*Priestley v. Fernie*, 1865, 3 H. & C. 977), the question whether such an election has been made is a question of fact. In *Calder v. Dobell*, 1871, L. R. 6 C. P. 486, where a broker bought goods and inserted his own name in the sold note as the buyer, and the seller invoiced the goods to him, and called upon him to accept and pay for them, threatening legal proceedings, it was held that the conduct of the seller was not



conclusive proof of an election by him to give exclusive credit to the broker, and that whether he had so elected or not was a question for the jury. Nor is such conduct as taking an acceptance from the agent for the amount due, and renewing such acceptance from time to time (*Robinson v. Read*, 1829, 9 Barn. & Cress. 449; *Whitwell v. Perrin*, 1858, 4 C. B. N. S. 412; *The Huntsman*, [1894] Prob. 214), or proving for the amount against the agent's estate in bankruptcy (*Curtis v. Williamson*, 1874, L. R. 10 Q. B. 57; *Morgan v. Couchman*, 1853, 14 C. B. 100; *Fell v. Parkin*, 1882, 52 L. J. Q. B. 99), conclusive proof of such an election, though of course it is strong evidence thereof.

*Settlement by Principal with Agent.*—Where an agent buys goods in his own name from a person who gives exclusive credit to him, believing him to be buying on his own account, and the principal in good faith pays the agent for the goods at a time when the seller still continues to give exclusive credit to the agent, believing him to be the principal in the transaction, the principal is discharged from liability to the seller (*Armstrong v. Stokes*, 1872, L. R. 7 Q. B. 598). Subject to this, a principal is not discharged from liability upon a contract made on his behalf, by settling, or otherwise dealing to his detriment, with the agent who made the contract, unless the other contracting party has by his conduct led the principal to believe that the agent has discharged the liability, or that he has elected to look to the agent alone for the discharge thereof, and the principal settles or otherwise deals to his detriment with the agent in consequence of such belief. In other words, the principal is not discharged by paying or settling with his own agent, unless the conduct of the creditor is such as to estop him, as between himself and the principal, from denying that he has been paid (*Heald v. Kenworthy*, 1855, 10 Ex. Rep. 739; *Davison v. Donaldson*, 1882, 9 Q. B. D. 623; *Dent v. Dunn*, 1812, 3 Camp. N. P. 296; 13 R. R. 809; *Macfarlane v. Giannacopulo*, 1858, 3 H. & N. 860). Thus, if a creditor takes a security from the agent of his debtor, and gives the agent a receipt for the debt, the debtor will be discharged if he deal to his detriment with the agent on the faith of the receipt (*Wyatt v. Hertford*, 1802, 3 East, 147; *Smyth v. Anderson*, 1849, 7 C. B. 21). So, if goods are sold to an agent on cash terms, the seller's omission to enforce cash payment may, under certain circumstances, be calculated to induce a reasonable belief that he has been paid, so as to discharge the principal in the event of his acting to his prejudice on the faith of such a belief (*MacClure v. Schemeil*, 1871, 20 W. R. 168; *Kymer v. Suwercropp*, 1807, 1 Camp. N. P. 109; 10 R. R. 646). But the mere omission to insist upon prepayment in such a case, or mere delay in enforcing payment, or in making application to the principal for payment, is not sufficiently misleading conduct upon which to found an estoppel, unless there are special circumstances rendering such omission or delay misleading in the particular case (*Irvine v. Watson*, 1880, 5 Q. B. D. 102, 414; cp. *Smethurst v. Mitchell*, 1859, 1 El. & El. 623; *Fell v. Parkin*, 1882, 52 L. J. Q. B. 99). In *Davison v. Donaldson*, 1882, 9 Q. B. D. 623, a principal was held not to be discharged by a settlement with his agent, though the creditor made no application to the principal until three years after the debt was contracted, and the agent had in the meantime become bankrupt.

*Right of Principal to sue on Agent's Contracts.*—The contract of an agent being deemed, as a general rule, to be the contract of the principal by whose authority it is made, it follows that a principal is generally entitled to intervene and sue in his own name upon any contract duly made on his behalf, unless it is inconsistent with the terms of the contract that the



principal should have a right of action thereon. Except in the case of contracts by deed, this rule applies notwithstanding that the contract is made in the name of the agent, and the principal is undisclosed and entirely unknown to the other contracting party. Thus, the principal may sue for the price of goods sold by a factor or broker in his own name, though the purchaser believed at the time of the sale that the factor or broker was selling his own goods (*Rabone v. Williams*, 1785, 7 T. R. 360; 4 R. R. 463; *Sadler v. Leigh*, 1815, 4 Camp. N. P. 195; *Cooke v. Eshelby*, 1887, 12 App. Cas. 271). So, where a part-owner of a whaling vessel sold the produce of a voyage in his own name, it was held that the owners of the vessel were entitled to sue jointly for the price, though the purchaser had no knowledge that any other person than the one who made the contract was interested in the goods sold (*Skinner v. Stocks*, 1821, 4 Barn. & Ald. 437; see also *Cothay v. Fennell*, 1830, 10 Barn. & Cress. 671). So, if a person carries on business in the name of himself and another person whom he employs as his clerk, he is entitled to sue alone upon a contract made in the name in which the business is carried on (*Spurr v. Cass*, 1870, L. R. 5 Q. B. 656; *Kell v. Nainby*, 1829, 10 Barn. & Cress. 20). Where an agent enters into a contract, whether verbally or in writing, in his own name, parol evidence may be given by the principal to show that the contract was made on his behalf, so as to entitle him to sue thereon (*Morris v. Wilson*, 1859, 5 Jur. N. S. 168; *Bateman v. Phillips*, 1812, 15 East, 272); provided, that when the contract is in writing, such evidence cannot be given if it is inconsistent with the express terms thereof (*Humble v. Hunter*, 1848, 12 Ad. & E. N. S. 310, where an agent who executed a charter-party in his own name was described therein as the owner of the vessel, and it was held that the principal was not entitled to give evidence of the agency, because such evidence was inconsistent with the description of the agent as the owner). The right of the principal to sue in his own name is not affected by a rule or custom of the market in which the contract is made, according to which the agent alone is in such market regarded as the contracting party (*e.g.* in the case of contracts made by brokers on the Stock Exchange), whether the principal was aware of the existence of such a rule or custom at the time when he authorised the agent to make the contract or not (*Langton v. Waite*, 1868, L. R. 6 Eq. 165; *Humphrey v. Lucas*, 1845, 2 Car. & Kir. 152). But his right to sue may be excluded by the terms of the contract. Thus if a part-owner of a ship insures her in a mutual insurance association of which he is a member, and it is provided by the policy that the right to recover in respect of losses shall be confined to members of the association, the other part-owners, not being members, have no right to sue on the policy as undisclosed principals (*Montgomerie v. U. K. Mutual S.S. Association*, [1891] 1 Q. B. 370).

*Foreign Principals.*—In the absence of evidence to the contrary, it is presumed that a home agent is not authorised to establish privity of contract between his foreign principal and third persons (see the cases cited in treating of the liability of the principal upon an agent's contracts). A foreign principal, therefore, is not entitled to sue upon a contract made in England on his behalf, unless it is proved that the agent was authorised to make the principal a contracting party, and it appears to have been the intention of the agent and of the other contracting party that privity of contract should be established between the principal and such other contracting party (*Die Elbinger Actien Gesellschaft v. Claye*, 1873, L. R. 8 Q. B. 313; *Malcolm v. Hoyle*, 1893, 63 L. J. Q. B. 1).



As to the right of the principal to sue upon a deed executed on his behalf, see POWER OF ATTORNEY.

*Principal's Right to sue, when subservient to that of Agent.*—Where an agent, with the authority of the principal, makes a contract in his own name, so that he has a right to sue thereon, and he would be entitled as against the principal to a lien upon any sum recovered in respect of the contract, the right of the principal to sue on the contract is subservient to that of the agent, so long as the claim for which the agent would be entitled to such lien subsists; and if the other contracting party pays or settles with the agent before the satisfaction of such claim, he is discharged from liability to the principal, though the principal may have given him notice requiring payment to himself; and to the extent of the claim secured by the lien of the agent, the payment or settlement may be by way of set-off or settlement of accounts between the agent and the other contracting party (*Drinkwater v. Goodwin*, 1775, Cowp. 251; *Hudson v. Granger*, 1821, 5 Barn. & Ald. 27; *Warner v. McKay*, 1836, 1 Mee. & W. 591).

*Defences available against Principal.*—Where a principal sues upon a contract made by his agent, the other contracting party may set up, by way of defence, the fraud, misrepresentation, knowledge, or non-disclosure of the agent as effectually as he could have set up the fraud, misrepresentation, knowledge, or non-disclosure of the principal if the principal had been suing upon a contract made by himself. In *Mullens v. Miller*, 1882, 22 Ch. D. 194, specific performance of a contract was refused on the ground of the misrepresentation by the agent of certain facts affecting the value of the property sold. In *Blackburn v. Haslam*, 1888, 21 Q. B. D. 144, it was held that the assured could not recover on a policy of insurance, because the agent who had negotiated it had omitted to disclose a material fact within his knowledge. In *Biggs v. Lawrence*, 1789, 3 T. R. 454; 1 R. R. 740, it was held that a principal was not entitled to recover the price of goods sold, because the agent who sold them knew they were intended to be used for an unlawful purpose. So, where an agent lent money to an executor, knowing that he intended to misapply it, and took a mortgage of the testator's property as security for repayment, and the executor did misapply the money, it was held that the mortgage was invalid, and that the principal had no claim against the estate of the testator (*Collinson v. Lister*, 1855, 7 De G., M. & G. 634). The fraud, non-disclosure, or knowledge of the principal also constitutes as good a defence, in an action by him upon a contract made by his agent, as if the contract had been made by himself (*Ludgater v. Love*, 1881, 44 L. T. 694; *Mayhew v. Eames*, 1825, 3 Barn. & Cress. 601).

*Defences when Agent allowed to appear as Principal.*—If an agent is permitted to appear as the principal in a transaction, and the person dealing with him does so in the belief that he is the principal, such person is entitled, upon the disclosure of the real principal, to be put in the same position as if the agent had been the principal, and therefore to avail himself, in an action by the principal, of every defence which would have been available against the agent at the time when the real principal was first disclosed. Thus, if an agent is permitted to sell goods as the owner thereof, and the buyer, in the belief that the agent is the owner, receives them in discharge of a debt due from him, or pays or otherwise settles with him for the price, the buyer is discharged from liability to the principal (*Ramazotti v. Bowring*, 1859, 7 C. B. N. S. 851; *Coates v. Lewes*, 1808, 1 Camp. N. P. 444; 10 R. R. 725; *Curlew v. Birkbeck*, 1863, 3 F. & F. 894). So, where a factor or other agent, being intrusted with the possession of goods, or of the documents of title thereto, sells the goods in his own name to a person



who believes him to be selling his own goods, the buyer is entitled, in an action by the principal for the price, to set off a debt due from the agent personally, provided the debt was incurred before the buyer received notice that the goods were not the property of the agent (*George v. Clagett*, 1797, 7 T. R. 359; 4 R. R. 462; *Ex parte Dixon*, 1876, 4 Ch. D. 133; *Baring v. Corrie*, 1818, 2 Barn. & Ald. 137; 20 R. R. 383; *Rabone v. Williams*, 1785, 7 T. R. 360; 4 R. R. 463; *Borries v. Imp. Ottoman Bank*, 1873, L. R. 9 C. P. 38).

The rule is founded on the doctrine of estoppel, and applies only where the person dealing with the agent is led by the conduct of the principal to believe, and does in fact believe, that the agent is acting on his own behalf, and the right of set-off accrues before he is undeceived. If a person buys goods from an agent, knowing him to be selling them as agent, though not knowing who the principal is (*Semenza v. Brinsley*, 1865, 18 C. B. N. S. 467; *Moore v. Clementson*, 1809, 2 Camp. N. P. 22; 11 R. R. 653; *Fish v. Kempton*, 1849, 7 C. B. 687; *Hornby v. Lacy*, 1817, 6 M. & S. 166; 18 R. R. 345), or if he has no particular belief whether the seller is acting as an agent or on his own behalf (*Cooke v. Eshelby*, 1887, 12 App. Cas. 271), he has no right to set off, as against the principal, a debt due from the agent. Nor is the defence available where the right of set-off accrues after notice that the seller was acting as an agent (*Mildred v. Maspons*, 1883, 8 App. Cas. 874; *Kaltenbach v. Lewis*, 1885, 10 App. Cas. 617; *Ex parte Dixon*, 1876, 4 Ch. D. 133).

*Liability of Principal for Wrongs of Agent.*—A principal is civilly liable to third persons for everything wrongfully done or omitted by his agent while acting on his behalf, provided that the agent was acting either in pursuance of his authority or in the ordinary course of his employment. On the other hand, a principal is not liable for a wrong committed by his agent, if the agent was not acting on his behalf at the time, or if he was acting, without the principal's authority, outside the ordinary course of his employment. These principles extend to cases where the wrongful act is wilful or fraudulent; and when the wrong is committed by the agent in the ordinary course of his employment, the fact that the principal expressly instructed the agent not to do the act complained of is no defence (*Limpus v. L. G. O. Co.*, 1862, 1 H. & C. 526). Nor does the fact that the wrongful act is a felony constitute any defence (*Osborn v. Gillett*, 1873, L. R. 8 Ex. 88). Thus, if an agent, in the ordinary course of his employment on the principal's behalf, commits a trespass (*Hatch v. Hale*, 1850, 15 Ad. & E. 10; *Bates v. Pilling*, 1826, 6 Barn. & Cress. 38; *Hurry v. Rickman*, 1831, 1 Moo. & R. 126), or infringes a patent or trade-mark (*Betts v. De Vitre*, 1868, L. R. 3 Ch. 429; *Tonge v. Ward*, 1869, 21 L. T. 480), or wrongfully converts the goods or chattels of a third person, by refusing to deliver them up to him on demand (*Giles v. Taff Vale Rwy. Co.*, 1853, 2 El. & Bl. 822; *Yarborough v. Bank of England*, 1812, 16 East, 6; 14 R. R. 272), or by selling or otherwise disposing of them without his authority (*Tronson v. Dent*, 1853, 8 Moo. P. C. 419; *Ewbank v. Nutting*, 1849, 7 C. B. 797; *Cannan v. Meaburn*, 1823, 1 Bing. 243), the principal is civilly liable for the trespass, infringement, or conversion, even if he did not authorise it, to the same extent as he would have been if he had committed the wrong himself. So, if a factor or other agent fraudulently misrepresents the quality of goods sold by him on his principal's behalf, the principal is liable in an action of deceit, though he did not authorise the agent to make the misrepresentation (*Udell v. Atherton*, 1861, 7 H. & N. 172; *Hern v. Nichols*, 1 Salk. 289). So, where a wife, who managed a business on behalf of her husband, fraudu-



lently misrepresented the quantity of business done, to a person who bought the business on the faith of the misrepresentations, it was held that the husband was liable for the fraud (*Taylor v. Green*, 1837, 8 Car. & P. 316). On the same principle, a corporation or joint-stock company is liable, in an action of deceit, for the fraudulent misrepresentations of its directors or other agents, made in the course of their employment on its behalf, and for its benefit, though they were not authorised to make the misrepresentations (*Barwick v. Joint-Stock Bank*, 1867, L. R. 2 Ex. 259; *National Exchange Co. v. Drew*, 1855, 2 Macq. H. L. Cas. 103; *Mackay v. Commercial Bank*, 1874, L. R. 5 P. C. 394; *Blake v. Albion Life Ass. Society*, 1878, 4 C. P. D. 94; *Swire v. Francis*, 1877, 3 App. Cas. 106). On the other hand, if an agent, without the authority of the principal, commits a fraud for his own private ends, and not for the principal's benefit or supposed benefit, the principal is not liable for the fraud, because the agent in committing it was not acting on his behalf (*British Mutual Bank v. Charnwood Forest Rwy. Co.*, 1887, 18 Q. B. D. 714; *Thorne v. Heard*, [1895] App. Cas. 495; *Coleman v. Riches*, 1855, 2 Com. L. R. 795; *Weir v. Bell*, 1878, 3 Ex. D. 238; *Bishop v. Jersey*, 1854, 2 Drew. 143). Where, however, in consequence of the fraud of an agent, the money or property of a third person comes to the hands of the principal, or is applied for his benefit, he is liable to restore such money or property, or to make compensation to the extent of the benefit received by him (*Reid v. Rigby*, [1894] 2 Q. B. 40; *Thompson v. Bell*, 1854, 10 Ex. Rep. 10; *Ex parte Shoolbred*, 1880, 28 W. R. 339; *Marsh v. Keating*, 1834, 1 Bing. N. C. 198; *Gyln v. Baker*, 1811, 13 East, 509).

If, at the time of the wrongful act or omission, the agent was not acting within the scope of his actual authority, nor in the ordinary course of his employment, the principal is not liable for the wrong. Thus, where a bailiff, who was sent to levy a distress, committed an unnecessary and unauthorised assault (*Richards v. West Middlesex Waterworks Co.*, 1885, 15 Q. B. D. 660), and where the manager of a sewage farm committed an unauthorised trespass upon land adjoining the farm (*Bolinbroke v. Swindon Local Board*, 1874, L. R. 9 C. P. 575), it was held that the principal was not liable. So, if a solicitor, when issuing a writ of *fi. fa.*, verbally directs the sheriff to seize particular goods which are not the property of the debtor, without the client's authority, the client is not liable for the trespass, because it is not in the ordinary course of a solicitor's employment to interfere with the sheriff in the performance of his duties (*Smith v. Keal*, 1882, 9 Q. B. D. 340; *Hewitt v. Spiers*, 1896, 13 T. L. R. 64). Otherwise, where the sheriff is misled by the solicitor's indorsement on the writ, it being part of the solicitor's duty, in the ordinary course of his employment, to indorse the writ (*Morris v. Salberg*, 1889, 22 Q. B. D. 614; *Lee v. Rumilly*, 1891, 55 J. P. 519). So, a company is not liable for the unauthorised misrepresentations of its secretary, it not being in the ordinary course of a secretary's employment to make any representations whatever on behalf of the company (*Barnett v. South London Tram. Co.*, 1887, 18 Q. B. D. 815; *Newlands v. Employers' Accident Association*, 1885, 54 L. J. Q. B. 428).

The liability of a principal for the wrongs of his agent is a joint and several liability with the agent. The injured party may sue either or both of them, but if he chooses to sue the agent alone, and recovers judgment against him, such judgment, though unsatisfied, is a bar to any proceedings against the principal (*Brinsmead v. Harrison*, 1872, L. R. 7 C. P. 547; *Wright v. L. G. O. Co.*, 1877, 2 Q. B. D. 271).

*Misrepresentations as to Credit.*—In consequence of the provisions of Lord Tenterden's Act (9 Geo. IV. c. 14), s. 6, a principal cannot be sued in



respect of misrepresentations made by his agent as to the character or credit of a person, to the intent that such person may obtain money or goods upon credit, unless the representation is in writing, signed by the principal himself. The signature of the agent is insufficient, even if it be expressly authorised or ratified by the principal (*Swift v. Jewesbury*, 1874, L. R. 9 Q. B. 301).

*Liability for Innocent Misrepresentations of Agent.*—Where an agent, without the principal's authority, makes a false statement, believing it to be true, with regard to facts of which the principal has knowledge, a difficulty arises. The agent has not committed any fraud, nor has the principal authorised any. It is clear, however, that if the principal intentionally concealed the truth from the agent, in order that he might make a false statement, the principal is liable as for a fraudulent misrepresentation (*Ludgater v. Love*, 1881, 44 L. T. 694). Whether the principal is liable in an action of deceit, in the absence of such an intentional concealment, is a question upon which there is a conflict of authority (see *Cornfoot v. Fowke*, 1840, 6 Mee. & W. 358; *Brett v. Clowser*, 1880, 5 C. P. D. 376; *Fuller v. Wilson*, 1842, 3 Ad. & E. N. S. 58, 68, 1009). After the judgments of the Lords in *Derry v. Peek*, 1889, 14 App. Cas. 337, it seems probable that he would not be held liable—at all events in that form of action.

#### RELATIONS BETWEEN AGENTS AND THIRD PERSONS.

*Liability of Agent on Contracts.*—An agent is not personally liable upon any contract made by him merely in his representative capacity, such a contract being deemed to be the contract of the principal alone (*Johnson v. Ogilby*, 1734, 3 P. Wms. 277; *Owen v. Gooch*, 1797, 2 Esp. 567; *Ex parte Hartop*, 1806, 12 Ves. Jun. 352). Even where the agent has no authority to make the contract on behalf of the principal, he is not personally liable on the contract, if he professes to make it merely in his capacity of agent (*Lewis v. Nicholson*, 1852, 18 Ad. & E. N. S. 503; *Jenkins v. Hutchinson*, 1849, 13 Ad. & E. N. S. 744), though he may be liable upon an implied warranty that he is duly authorised (see *post*). This principle extends to cases where the agent is guilty of fraud, and makes the contract, knowing that he has not authority to do so (S. C.). An agent may, however, though contracting on behalf of his principal, intend to pledge his own credit, or he may execute the contract in such a manner, or contract in such terms, or otherwise act in such a way as to estop himself from denying that such was his intention. In such cases he is personally liable on the contract, whether the principal be disclosed or undisclosed, and the other contracting party may, as a general rule, elect to charge either him or the principal thereon (*Dramburg v. Pollitzer*, 1873, 28 L. T. 470; *Saxon v. Blake*, 1861, 29 Beav. 438). Thus, if an agent buys goods at a sale by auction, and gives his own name as buyer, he is personally liable, unless he can clearly prove that he did not intend to contract personally, and that the auctioneer was aware of that (*Williamson v. Barton*, 1862, 7 H. & N. 899). So, if an agent takes delivery of goods, as assignee of a bill of lading which provides that the goods shall be delivered to the "consignee or his assigns, he or they paying freight," he is personally liable on an implied contract to pay the freight, though the bill of lading was assigned to him merely as an agent for sale (*Bell v. Kymer*, 1814, 5 Taun. 477; *Dougal v. Kemble*, 1826, 3 Bing. 383; cp. *Amos v. Temperley*, 1841, 8 Mee. & W. 798; *Steel v. Houlder*, 1887, 3 T. L. R. 300; *Wilson v. Kymer*, 1813, 1 M. & S. 157). So, where an auctioneer sold goods in his possession, under conditions of



sale which provided that the lots should be cleared within three days, and that if from any cause the auctioneer was unable to deliver, etc., the purchaser should accept compensation, it was held that the auctioneer must be taken to have personally contracted to duly deliver the goods, though the name of the principal was disclosed at the sale (*Woolfe v. Horne*, 1877, 2 Q. B. D. 355). An auctioneer is generally deemed to contract personally when the name of the principal is not disclosed at the sale (*Franklyn v. Lamond*, 1847, 4 C. B. 637; *Wood v. Baxter*, 1883, 49 L. T. 45).

The question whether an agent who has entered into a contract is to be deemed to have contracted personally, or merely in his representative capacity, depends, in the case of a contract under seal, upon the manner in which the deed is executed; in the case of a bill of exchange, promissory note, or cheque, upon whether his name appears thereon as the contracting party; and in the case of any other contract, upon what appears to have been the intention of the parties. Such intention, if the contract is in writing, is a question of law, and must, as a general rule, be ascertained exclusively from the terms of the written agreement (*Spittle v. Lavender*, 1821, 5 Moo. K. B. 270; *Bowes v. Shand*, 1877, 2 App. Cas. 455). In the case of a contract not reduced to writing, it is a question of fact (*Jones v. Littledale*, 1837, 6 Ad. & E. 486; *Holding v. Elliott*, 1860, 5 H. & N. 117; *Lakeman v. Mountstephen*, 1874, L. R. 7 H. L. 17; *Seaber v. Hawkes*, 1831, 5 Moo. & P. 549; *Ex parte Hartop*, 1806, 12 Ves. Jun. 352). In *Long v. Millar*, 1879, 4 C. P. D. 450, an estate agent, who contracted to sell land, gave a receipt for the deposit in his own name, and it was held that it was a question for the jury whether he had contracted personally. Where an agent has made a contract in England on behalf of a principal who resides abroad, it is presumed that he intended to pledge his own credit, unless a contrary intention appears from the terms of the contract, or from the other circumstances of the case (*Hutton v. Bulloch*, 1874, L. R. 9 Q. B. 572; *Die Elbinger Actien Gesellschaft v. Claye*, 1873, L. R. 8 Q. B. 313; *Dramburg v. Pollitzer*, 1873, 28 L. T. 470; *Peterson v. Ayre*, 1853, 13 C. B. 353). This, however, is merely a presumption of fact, and does not affect the general rule that, in the case of a written contract, the intention is to be ascertained from the terms thereof (*Gadd v. Houghton*, 1876, 1 Ex. D. 357; *Glover v. Langford*, 1892, 8 T. L. R. 628; *Green v. Hopke*, 1856, 18 C. B. 549; *Mahony v. Kekulé*, 1854, 14 C. B. 390; *Reynolds v. Peapes*, 1890, 6 T. L. R. 49).

*Contracts under Seal.*—The question whether an agent is personally liable upon a deed executed on behalf of his principal, depends upon whether the deed is executed in the name of the principal, or in the name of the agent. If the principal is named as the party to the deed, and it is executed in his name, or is expressed to be executed on his behalf, the agent is not liable. But an agent who covenants under his own hand and seal is personally liable on the covenant, even if he is described in the deed as covenanting for and on behalf of a principal therein named (*Appleton v. Binks*, 1804, 5 East, 148; 7 R. R. 672; *Cass v. Rudele*, 1692, 2 Vern. 280).

*Bills of Exchange, Promissory Notes, and Cheques.*—Signature is essential to liability upon a bill of exchange, promissory note, or cheque (Bills of Exchange Act, 1882, s. 23). An agent, therefore, is not liable on such an instrument, unless his name appears therein as the contracting party. Where the name of an agent appears as the drawee of a bill of exchange, and he signs it, he is personally liable as acceptor, even if he adds words to the signature indicating that he signs for and on behalf of his principal or



as an agent, because the only person who can be liable as acceptor is the person on whom the bill is drawn; and in determining whether a signature is that of the principal or that of the agent by whose hand it is written, the construction most favourable to the validity of the instrument is adopted (*ibid.* s. 26 (2); *Mare v. Charles*, 1856, 5 El. & Bl. 978; *Jones v. Jackson*, 1870, 22 L. T. 728; *Herald v. Connah*, 1876, 34 L. T. 885; *Nicholls v. Diamond*, 1853, 9 Ex. Rep. 154). On the other hand, where the name of the principal appears as that of the drawee, and the agent accepts the bill, he is not liable as acceptor, even if he signs his own name, without any qualification (*Polhill v. Walter*, 1832, 3 Barn. & Adol. 114; *Okell v. Charles*, 1876, 34 L. T. 822). With regard to liability as drawer or indorser of a bill of exchange or cheque, or as maker or indorser of a promissory note, the agent is not liable where he merely signs the principal's name, or where he qualifies his signature by adding words thereto, indicating that he signs for and on behalf of a principal or as an agent (Bills of Exchange Act, 1882, s. 26 (1); *Wilson v. Barthrop*, 1837, 2 Mee. & W. 863; *Alexander v. Sizer*, 1869, L. R. 4 Ex. 102; *Aggs v. Nicholson*, 1856, 1 H. & N. 165; *Lindus v. Melrose*, 1858, 3 H. & N. 177); but he is personally liable if he signs his own name without any such qualification; and the mere addition of words describing him as an agent is not sufficient to exempt him from personal liability on the instrument, whether the principal is named therein or not (*Nicholls v. Diamond*, 1853, 9 Ex. Rep. 154; *Leadbitter v. Farrow*, 1816, 5 M. & S. 345; 17 R. R. 345; *Sowerby v. Butcher*, 1834, 2 C. & M. 368; *Allan v. Miller*, 1870, 22 L. T. 825; *Dutton v. Marsh*, 1871, L. R. 6 Q. B. 361; *Penkivil v. Connell*, 1850, 5 Ex. Rep. 381; *Healey v. Storey*, 1848, 3 Ex. Rep. 3; *Fox v. Frith*, 1842, 10 Mee. & W. 131; *Bottomley v. Fisher*, 1862, 1 H. & C. 211).

*Written Contracts generally.*—In the case of a contract in writing other than a bill of exchange, promissory note, or cheque, the question whether the agent is personally liable depends upon the intention of the parties, as shown by the terms of the written agreement as a whole (*Norton v. Herron*, 1825, 1 Car. & P. 648; *Tanner v. Christian*, 1855, 4 El. & Bl. 591). If the contract is signed by the agent in his own name, without qualification, he is presumed to have intended to contract personally, unless the terms of the contract are clearly inconsistent with such an intention (*Dutton v. Marsh*, 1871, L. R. 6 Q. B. 361; *Hough v. Manzanos*, 1879, 4 Ex. D. 104; *Cooke v. Wilson*, 1856, 1 C. B. N. S. 153; *Parker v. Winlow*, 1857, 7 El. & Bl. 942; *Kennedy v. Gouveia*, 1823, 3 Dow. & Ry. K. B. 503). In *Paice v. Walker*, 1870, L. R. 5 Ex. 173, an agent, who signed a contract in his own name, was held personally liable, though in the body of the contract he was expressed to be acting “as agent for” a principal therein named. Where, however, the agent is described in the contract as acting “on account of” or “on behalf of” a named principal, that is, as a general rule, sufficient to exclude personal liability, though the principal be a foreigner, and though the contract be signed by the agent in his own name (*Gadd v. Houghton*, 1876, 1 Ex. D. 357; *Ogden v. Hall*, 1879, 40 L. T. 751; *Spittle v. Lavender*, 1821, 2 B. & B. 452; *Downman v. Williams*, 1845, 7 Ad. & E. N. S. 103). In *Gadd v. Houghton*, two of the Lords Justices disapproved the decision in *Paice v. Walker*, on the ground that the words “as agent for” were sufficient to show that there was no intention to contract personally.

Where the agent adds words to his signature, indicating that he signs as an agent, or for or on behalf of a principal, he is not personally liable, unless the terms of the contract clearly show that, notwithstanding the form of the signature, he intended to contract personally (*Green v. Hopke*, 1856,



18 C. B. 549; *Mahony v. Kekulé*, 1854, 14 C. B. 390; *Deslandes v. Gregory*, 1860, 30 L. J. Q. B. 36; *Redpath v. Wigg*, 1866, L. R. 1 Ex. 335). In *Lennard v. Robinson*, 1855, 5 El. & Bl. 125, and *Young v. Schuler*, 1883, 11 Q. B. D. 651, the agent was held personally liable, although he signed the contract in such a manner as to *prima facie* exclude personal liability, because the terms of the contract were such as to show, notwithstanding the qualified signature, that he intended to contract personally. The mere fact that the agent is described as an agent for a named principal, whether as part of the signature or in the body of the contract, is not deemed to be a qualification of the signature, or to indicate an intention not to contract personally (*Parker v. Winlow*, 1857, 7 El. & Bl. 942; *McCollin v. Gilpin*, 1881, 6 Q. B. D. 516; *Hutcheson v. Eaton*, 1884, 13 Q. B. D. 861).

*When Parol Evidence of Intention admissible.*—Where an agent enters into a written contract in such terms as to indicate an intention to contract personally, he cannot give parol evidence for the purpose of showing that it was the intention of the parties that he should not be personally liable on the contract, because such evidence would be inconsistent with the terms of the written agreement (*Higgins v. Senior*, 1841, 8 Mee. & W. 834; *Holding v. Elliott*, 1860, 5 H. & N. 117; *Jones v. Little-dale*, 1837, 6 Ad. & E. 486). In such a case, however, a plea by the agent, that before he signed the contract it was verbally agreed between him and the other contracting party that he should not be personally liable thereon, and that he *bona fide* believed at the time when he signed it that he would not be personally liable, is a good equitable plea, and may be proved by parol evidence, because it would be inequitable to take advantage of the mistake in drawing the contract in such a manner as to make him personally liable (*Wake v. Harrop*, 1862, 1 H. & C. 202). Where an agent signs a contract expressly “as agent,” or otherwise contracts in writing in such terms as to *prima facie* exclude personal liability, parol evidence is nevertheless admissible to show that, by a custom or usage of trade, an agent so contracting is, under the circumstances, personally liable; provided that such custom or usage is not inconsistent with the express terms of the contract. In *Hutchinson v. Tatham*, 1873, L. R. 8 C. P. 482, an agent signed a charter-party expressly “as agent for principals,” who were undisclosed, and it was held that evidence of a general custom, whereby an agent so signing was personally liable in the event of his not disclosing the principal within a reasonable time after the contract was made, was admissible. So evidence of a custom or usage of a particular trade, whereby a broker entering into a contract as such, is understood to contract personally, unless he discloses the principal at the time of the contract (*Pike v. Ongley*, 1887, 18 Q. B. D. 708; *Dale v. Humfrey*, 1858, El. B. & E. 1004), or unless the name of the principal is inserted in the contract (*Fleet v. Murton*, 1871, L. R. 7 Q. B. 126; *Bacmeister v. Fenton*, 1883, 1 C. & E. 121), is admissible. But where a broker entered into a contract containing a provision that he should act as arbitrator in the event of a dispute between the parties, it was held that evidence of a custom by which he would be personally liable was not admissible, because such a custom was inconsistent with the arbitration clause (*Barrow v. Dyster*, 1884, 13 Q. B. D. 635). It may be proved by parol evidence that a person who has contracted professedly as an agent is himself the real principal, and was contracting on his own behalf, so as to render him liable on the contract (*Carr v. Jackson*, 1852, 7 Ex. Rep. 382; *Jenkins v. Hutchinson*, 1849, 13 Ad. & E. N. S. 744; *Railton v. Hodgson*, 1812, 15 East, 67; 13 R. R. 373).

*Liability where Principal Fictitious or Non-existent.*—Where a person



contracts, professedly on behalf of another person, who is fictitious or non-existent, the professed agent is presumed to intend to contract personally, unless a contrary intention appears, and in the case of a contract in writing, parol evidence of such contrary intention is not admissible (*Scott v. Ebury*, 1867, L. R. 2 C. P. 255; *Coutts v. Irish Exhibition*, 1891, 7 T. L. R. 313). In *Kelner v. Baxter*, 1866, L. R. 2 C. P. 174, the defendants had entered into a written contract in which they were described as contracting on behalf of a company then in the course of formation, and it was held that they were personally liable, because otherwise no effect could be given to the contract, and that parol evidence was not admissible to show that they did not intend to contract personally. This case is sometimes cited as an authority for the proposition that a person contracting professedly as agent for a nonentity is personally liable on the contract, but such a proposition is too wide. A person so contracting will not be held personally liable contrary to the proved intention of the parties, or where a contrary intention plainly appears from the terms of the contract (*Jones v. Hope*, 1880, 3 T. L. R. 247 n; *Hollman v. Pullin*, 1884, 1 C. & E. 254; *Overton v. Hewett*, 1887, 3 T. L. R. 246).

*Implied Warranty of Authority.*—Where a person, by professing to contract on behalf of another, or otherwise by words or conduct, represents that he has authority to contract or act on behalf of another, and the person to whom the representation is made acts upon it, the person making the representation is deemed to impliedly warrant that he has the authority which he professes to exercise or have, in the absence of agreement, express or implied, to the contrary. This principle applies whether the professed agent acts in good faith, believing that he has authority, or acts fraudulently, knowing that he has not authority (*Collen v. Wright*, 1857, 8 El. & Bl. 647; *Suart v. Haigh*, 1893, 9 T. L. R. 488; *Hughes v. Graeme*, 1864, 33 L. J. Q. B. 335; *Oxenham v. Smythe*, 1861, 6 H. & N. 690). Thus, where the directors of a company, who had no authority to overdraw the company's banking account, wrote a letter to the bank, representing that the manager of the company was authorised to draw cheques on the account, which, to their knowledge, was then overdrawn, it was held that they were liable to the bank on an implied warranty that they had the company's authority to overdraw the account (*Cherry v. Colonial Bank*, 1869, 38 L. J. P. C. 49; cp. *Beattie v. Ebury*, 1874, L. R. 7 H. L. 102). So, if the directors of a company which has fully exercised its borrowing powers borrow money professedly on behalf of the company, or hold out an officer or agent of the company as having authority to borrow on its behalf, they are deemed to warrant to any person lending money on the faith of such representation or holding out, that they are duly authorised to borrow on behalf of the company, and are liable for breach of such implied warranty, though they acted in good faith, not knowing that the borrowing powers had been exhausted (*Firbank v. Humphreys*, 1886, 18 Q. B. D. 54; *Weeks v. Propert*, 1873, L. R. 8 C. P. 427; *Chapleo v. Brunswick Building Society*, 1881, 6 Q. B. D. 696; see also *Richardson v. Williamson*, 1871, L. R. 6 Q. B. 276). When the agent acts fraudulently, he may be sued *ex delicto* for the deceit, or *ex contractu* for breach of the implied warranty, at the option of the person deceived (*Randell v. Trimen*, 1856, 18 C. B. 786; *Polhill v. Walter*, 1832, 3 Barn. & Adol. 114). A warranty of authority will not, however, be implied contrary to the proved intention of the parties. In *Lilly v. Smales*, [1892] 1 Q. B. 456, a shipbroker entered into a charter-party and signed it "by telegraphic authority; as agent," and upon evidence being given that such a form of signature was commonly adopted in order to negative the implica-



tion of any further warranty than that a telegram which purported to authorise the agent to make the contract in question had been received, it was held that the shipbroker was not liable for a mistake in the telegram (cp. *Suart v. Haigh*, 1893, 9 T. L. R. 488). And the doctrine of implied warranty of authority only applies where the assumption of authority implies a misrepresentation of fact, and not where the facts are fully known to both parties, and there is merely an innocent misrepresentation, or a common misconception, as to the existence or extent of the authority in point of law (*Rashdall v. Ford*, 1866, L. R. 2 Eq. 750; *Eaglesfield v. Londonderry*, 1876, 38 L. T. 303; *Jones v. Hope*, 1880, 3 T. L. R. 247).

The measure of damages recoverable for breach of a warranty of authority is the loss actually sustained in consequence of the breach of warranty, provided such loss is a natural and probable consequence thereof, or is such as the parties might, under the particular circumstances, have reasonably expected to result as a consequence thereof (*Pow v. Davis*, 1861, 1 B. & S. 220; *Godwin v. Francis*, 1870, L. R. 5 C. P. 295; *Spedding v. Nevell*, 1869, L. R. 4 C. P. 212). In other words, the plaintiff is entitled to recover, not only the loss sustained in consequence of the misrepresentation, but also the estimated profit that he would have made upon the transaction if the agent had been duly authorised. In *Simons v. Patchett*, 1857, 7 El. & Bl. 568, where a person contracted to buy a ship on behalf of another, without his authority, it was held that the measure of damages was the difference between the contract price and the price at which the ship was resold by the seller, upon the contract being repudiated by the person on whose behalf it was made. In *Ex parte Panmure*, 1883, 24 Ch. D. 367, a broker, being instructed to apply for shares in a certain company, by mistake made the application to another company, and shares in such other company were allotted to the principal. The company being subsequently wound up, and the principal's name removed from the list of contributories on the ground that he had not authorised the application for shares, it was held that the broker was liable to pay to the liquidator the full amount payable on the shares (see also *Meek v. Wendt*, 1888, 21 Q. B. D. 126; *Firbank v. Humphreys*, *Richardson v. Williamson*, and the other cases cited *supra*). Where, however, the repudiated contract would not have been enforceable at law, as against the person on whose behalf it was entered into, because the formalities required by law were not complied with, the doctrine of part performance does not apply, so as to render the professed agent liable for damages, either at law or in equity, for the breach of warranty of authority, even if the contract would, in pursuance of such doctrine, have been enforceable in equity against the professed principal had it been made with his authority (*Warr v. Jones*, 1876, 24 W. R. 695; *Sainsbury v. Jones*, 1840, 2 Beav. 462).

*Right of Agent to sue on Contracts.*—An agent has no right of action upon any contract made by him merely in his representative capacity, except where he is entitled to a lien upon, or has a special property in, the subject-matter of the contract, or has some beneficial interest in the completion thereof. This principle applies whether the principal is disclosed or undisclosed (*Sargent v. Morris*, 1820, 3 Barn. & Ald. 277; 22 R. R. 382; *Gray v. Pearson*, 1870, L. R. 5 C. P. 568; *Evans v. Hooper*, 1875, 1 Q. B. D. 45; *Bowen v. Morris*, 1810, 2 Taun. 374), and though the agent is acting under a *del credere* commission (*Bramwell v. Spiller*, 1870, 21 L. T. 672). Thus, where a broker contracted as follows: "I have this day sold you, on account of X., etc." (signed) "A. B., broker," it was held that he could not sue the



buyer for refusing to accept the goods (*Fairlie v. Fenton*, 1870, L. R. 5 Ex. 169). Nor, if the buyer accepted the goods in such a case, would the broker be entitled to sue him for the price (*Fawkes v. Lamb*, 1862, 31 L. J. Q. B. 98). On the other hand, a factor or auctioneer is entitled to sue in his own name for the price of goods sold by him as such, because he has a special property in, and may have a lien upon, the goods (*Snee v. Prescott*, 1743, 1 Atk. 248; *Williams v. Millington*, 1788, 1 Black. H. 81; 2 R. R. 724; *Dickenson v. Naul*, 1833, 4 Barn. & Adol. 638; *Fisher v. Marsh*, 1865, 6 B. & S. 411). And if an agent contracts personally, he may sue in his own name on the contract (*Cooke v. Wilson*, 1856, 1 C. B. N. S. 153). In *Short v. Spackman*, 1831, 2 Barn. & Adol. 962, it was held that a broker, having bought goods in his own name, was entitled to recover damages against the seller for non-delivery thereof, though the seller was told at the time of the contract that the broker was acting on behalf of an unnamed principal, and the principal, with the acquiescence of the broker, renounced the contract, and it was arranged between them that he (the principal) should have no interest therein.

Except where the agent would be entitled to a lien, as against the principal, upon the sum recovered in respect of the contract, the right of an agent to sue in his own name upon a contract made on his principal's behalf is subservient to the right of the principal to sue, and ceases on the intervention of the principal; and the other contracting party, in an action by the agent on the contract, is entitled to avail himself of every defence, including that of set-off, which would have been available against the principal, if he had been suing on the contract (*Sadler v. Leigh*, 1815, 4 Camp. N. P. 195; *Rogers v. Hadley*, 1861, 2 H. & C. 227; *Atkinson v. Cotesworth*, 1825, 3 Barn. & Cress. 647). Where the agent would have a lien on the sum recovered, he has a right to sue, and compel payment to himself, in priority to the principal (*Drinkwater v. Goodwin*, 1775, Cowp. 251); and in such a case, the agent's right of lien will not be permitted to be prejudiced by a settlement between the principal and the other contracting party, or by a set-off against the principal, unless the conduct of the agent led the other contracting party to believe that he would be discharged by the settlement with the principal, or that he would be entitled to the right of set-off. In *Atkyns v. Amber*, 1796, 2 Esp. 493, where an agent sold, in his own name, goods upon which he had made advances, it was held that the buyer had no right, in an action by the agent for the price, to set off a debt due from the principal. So, where an auctioneer sued for the price of goods sold and delivered, a plea that he had sold the goods as auctioneer, and that the defendant had paid the principal for them before action, was held to be no answer, because the auctioneer would have had a lien on the proceeds for his charges (*Robinson v. Rutter*, 1855, 4 El. & Bl. 954). Otherwise, if the terms or conditions of the contract, or circumstances of the case, are such as to lead the other contracting party to believe that the agent acquiesces in his settling with, or setting off the debt due from, the principal (*Coppin v. Walker*, 1816, 7 Taun. 237; 17 R. R. 505; *Coppin v. Craig*, 1816, 7 Taun. 243; 17 R. R. 508), or if the agent is not prejudiced by such settlement or set-off (*Grice v. Kenrick*, 1870, L. R. 5 Q. B. 340).

Where an agent sues in his own name upon a contract made on behalf of his principal, the admissions of the principal, as well as the agent's own admissions, may be used in evidence against him (*Smith v. Lyon*, 1813, 3 Camp. N. P. 465; 14 R. R. 810; *Bauerman v. Radenius*, 1798, 7 T. R. 663; *Welstead v. Levy*, 1831, 1 Moo. & R. 138); and the defendant is entitled to discovery to the same extent as if the principal were a party to the action,



and to have the action stayed until such discovery is made, even if the principal be resident abroad (*Willis v. Baddeley*, [1892] 2 Q. B. 324).

As to the right of a person to sue upon a contract which he makes professedly as agent, but really on his own behalf as principal, see *Rayner v. Grote*, 1846, 15 Mee. & W. 359; *Schmaltz v. Avery*, 1851, 16 Ad. & E. N. S. 655; *Sharman v. Brandt*, 1871, L. R. 6 Q. B. 720; *Bickerton v. Burrell*, 1816, 5 M. & S. 383.

*Liability of Agent for Wrongs.*—Everyone is personally liable for his own wrongful acts and omissions. The fact that an agent is acting on behalf and by the authority of his principal is, therefore, no defence to an action by a third person for any wrongful act or omission by the agent (*Bennett v. Bayes*, 1860, 5 H. & N. 391; *Swift v. Jewesbury*, 1874, L. R. 9 Q. B. 301; *Cullen v. Thomson*, 1862, 4 Macq. H. L. Cas. 424; *Johnson v. Emerson*, 1871, L. R. 6 Ex. 329; *Perkins v. Smith*, 1752, 1 Wils. 328; *Cranch v. White*, 1835, 1 Bing. N. C. 414). Where the wrong is committed in the ordinary course of the agent's employment, or with the principal's authority, the principal is also liable, jointly and severally with the agent; and in such a case, if a judgment is obtained against the principal alone, the agent is discharged from liability, even though the judgment remains unsatisfied (*Brinsmead v. Harrison*, 1872, L. R. 7 C. P. 547).

#### DETERMINATION OF AGENCY.

The authority of an agent is determined by the expiration of the period (if any) for which it was given (*Dickinson v. Lilwall*, 1815, 4 Camp. N. P. 279); by the loss or destruction of the subject-matter of the agency (*Rhodes v. Forwood*, 1876, 1 App. Cas. 256); by the happening of any event rendering the continuance of the agency unlawful; or by the performance of the contract of agency, whereby the agent becomes *functus officio* (*Macbeath v. Ellis*, 1828, 4 Bing. 578; *Butler v. Knight*, 1867, L. R. 2 Ex. 109). If a broker or auctioneer is authorised to sell goods or other property, *prima facie* his authority ceases, and he becomes *functus officio*, immediately the contract of sale is entered into (*Blackburn v. Scholes*, 1810, 2 Camp. N. P. 343; 11 R. R. 723; *Xenos v. Wickham*, 1866, L. R. 2 H. L. 296; *Seton v. Slade*, 1802, 7 Ves. Jun. 265, 276; 6 R. R. 124). So, where a house-agent was employed to let or sell a house, it was held that he had no authority to negotiate for a sale thereof, after having let it (*Gillow v. Aberdare*, 1893, 9 T. L. R. 12). The authority of an agent may also be determined by operation of law, in the case of the death, lunacy, unsoundness of mind, or bankruptcy of the principal or agent; or by either of them giving notice to the other of the withdrawal of his assent to the contract of agency.

*Authority, when Irrevocable.*—When the authority of an agent is coupled with an interest, it is not determined by the death (*Kiddill v. Farnell*, 1857, 3 Sm. & G. 428; *Lepard v. Vernon*, 1813, 2 Ves. & Bea. 51; *Spooner v. Sandilands*, 1842, 1 Y. & C. C. 390; see, however, *Watson v. King*, 1815, 4 Camp. N. P. 272), lunacy, unsoundness of mind, or bankruptcy (*In re Rose*, 1894, 1 Manson, 218; *Yates v. Hoppe*, 1850, 9 C. B. 541; *Crowfoot v. Gurney*, 1832, 9 Bing. 372; *Drinkwater v. Goodwin*, 1775, Cowp. 251) of the principal, and cannot be revoked by him without the consent of the agent (*Gaussen v. Morton*, 1830, 10 Barn. & Cress. 731; *Raleigh v. Atkinson*, 1840, 6 Mee. & W. 670). An authority coupled with an interest means an authority given by deed (*Kiddill v. Farnell*, *supra*; *Gaussen v. Morton*, *supra*), or for valuable consideration (*Raleigh v. Atkinson*, *supra*; *Smart v. Sandars*, 1848, 5 C. B. 895), for the purpose of effectuating some security (*Walsh v. Whitcomb*, 1797, 2 Esp. 565), or of protecting or securing some



interest of the agent (*Alley v. Hotson*, 1815, 4 Camp. N. P. 325; *Smart v. Sandars*, 1848, 5 C. B. 895). Thus, a power of attorney given by a debtor to his creditor, authorising the creditor to sell certain land and discharge the debt out of the purchase-money, is irrevocable (*Gausson v. Morton*, 1830, 10 Barn. & Cress. 731; *Gurnell v. Gardner*, 1863, 4 Gif. 626). So, where a person agrees for valuable consideration to underwrite shares in a company, and authorises someone having an interest in the raising of the capital to apply for the shares in the name and on behalf of the underwriter, such authority is irrevocable (*Carmichael's case*, [1896] 2 Ch. 643). So, if the drawer of an accommodation bill gives the acceptor authority to pay the bill out of moneys in his hands (*Yates v. Hoppe*, 1850, 9 C. B. 541; *Chartered Bank v. Evans*, 1869, 21 L. T. 407). The authority of an agent is not, however, irrevocable merely because he has a personal interest in the exercise thereof, or because he has a special property in and lien upon the goods in respect of which the authority is given, unless the authority is given expressly for the purpose of securing such interest or lien. Thus, the authority of a factor or auctioneer to sell goods does not become irrevocable merely because he makes advances on the security thereof, and the principal fails to duly repay such advances, unless the authority was given in consideration of the advances, or the advances were made in consideration of an express or implied agreement by the principal that the authority to sell should be irrevocable (*Raleigh v. Atkinson*, 1840, 6 Mee. & W. 670; *Smart v. Sandars*, 1848, 5 C. B. 895; *De Comas v. Prost*, 1865, 3 Moo. P. C. N. S. 158; *Taplin v. Florence*, 1851, 10 C. B. 744). But where an agent, being duly authorised to do so, sells goods in his own name, and would be entitled to a lien on the proceeds as against the principal, the authority of the agent to sue the purchaser and give a discharge for the price is irrevocable during the subsistence of the claim in respect of which he would be entitled to the lien (*Drinkwater v. Goodwin*, 1775, Cowp. 251; *Robson v. Kemp*, 1802, 4 Esp. 233; *Hudson v. Granger*, 1821, 5 Barn. & Ald. 27).

If an agent is authorised to pay to a third person moneys in his hands belonging to the principal, and enters into a contract whereby he becomes personally liable to pay or hold such moneys to or to the use of such third person, the authority thereupon becomes irrevocable, and is not affected by the principal's bankruptcy (*Crowfoot v. Gurney*, 1832, 9 Bing. 372; *Walker v. Rostron*, 1842, 9 Mee. & W. 411; *Hutchinson v. Heyworth*, 1838, 9 Ad. & E. 375). In such a case, it is immaterial that the third person is indebted to the agent, who retains the moneys in respect of the debt (*Dickinson v. Marrow*, 1845, 14 Mee. & W. 713).

As to when a power of attorney is irrevocable against purchasers for value, see POWER OF ATTORNEY.

*Revocation by Death or Insanity.*—The authority of an agent, except when it is irrevocable, is determined by the death (*Shipman v. Thompson*, 1738, Willes, 104; *Farrow v. Wilson*, 1869, L. R. 4 C. P. 744; *Phillips v. Jones*, 1888, 4 T. L. R. 401; *Houstoun v. Robertson*, 1816, 6 Taun. 448), and probably by the lunacy or unsoundness of mind (*Drew v. Nunn*, 1879, 4 Q. B. D. 661), of either the principal or the agent; and where an agent is appointed by two or more principals jointly, his authority is determined by the death of any one of the principals (*Tasker v. Shepherd*, 1861, 6 H. & N. 575). The representatives of a deceased principal are not liable to remunerate an agent in respect of services performed after the death of the principal, even if the agent has no notice of his death at the time when the services are performed (*Campanari v. Woodburn*, 1854, 15 C. B. 400; *Pool v. Pool*, 1889, 58 L. J. Prob. 67; *Whitehead v. Lord*, 1852, 7 Ex. Rep. 691). And



it has been held that they are not bound by a contract entered into after the principal's death, though the person with whom the contract is made has no notice of such death, and though the agent was previously held out to such person by the principal as being authorised to contract on his behalf (*Blades v. Free*, 1829, 9 Barn. & Cress. 167, where the estate of a deceased husband was held not chargeable with the price of necessities supplied to his widow after his decease). See, however, on this point, the judgment of Brett, L.J., in *Drew v. Nunn* (cited below). The effect of the principal's insanity upon the authority of an agent was considered in *Drew v. Nunn*, 1879, 4 Q. B. D. 661, where a husband, who had held out his wife as having authority to pledge his credit, became insane, and a third person, on the faith of such holding out, and without notice of the insanity, supplied goods on the wife's orders. The Court, without deciding whether the insanity of the principal operates as a revocation of an agent's authority, held that the husband was liable for the price of the goods, on the ground that where a person is held out as an agent to others, they are justified in dealing with him as such, until they receive notice that the agency is determined.

*Revocation by Bankruptcy.*—The bankruptcy of an agent does not necessarily determine the contract of agency. Whether it does so or not depends upon the nature of the agent's authority and duties (*McCall v. Australian Meat Co.*, 1870, 19 W. R. 188; *Phelps v. Lyle*, 1840, 10 Ad. & E. 113). The bankruptcy of the principal generally operates as a revocation of an agent's authority, except when the authority is irrevocable, because the effect of the bankruptcy is to vest the property and effects of the principal in the trustee in bankruptcy, and to deprive him of his power to bind his estate (*Markwick v. Hardingham*, 1880, 15 Ch. D. 339; *Ex parte Snowball*, 1872, L. R. 7 Ch. 534; *Pearson v. Graham*, 1837, 6 Ad. & E. 899; *McEntire v. Potter*, 1889, 22 Q. B. D. 438). The bankruptcy commences from the first act of bankruptcy committed within the three months next preceding the presentation of the petition upon which the adjudication is made (46 & 47 Vict. c. 52, s. 43), except with regard to persons dealing with the bankrupt for valuable consideration before the date of the receiving order, and without notice of any available act of bankruptcy (s. 49). If an agent pays away moneys of the principal after receiving notice that he has committed an act of bankruptcy, and the principal is adjudicated bankrupt upon a petition presented within three months after such act of bankruptcy, the agent is personally liable to repay to the trustee the amount so paid away (*In re Lamb*, 1887, 55 L. T. 817; *Vernon v. Hankey*, 1787, 2 T. R. 113; *Hankey v. Vernon*, 1787, 3 Bro. C. C. 313; *In re Whitlock*, 1893, 63 L. J. Q. B. 245; *In re Pollitt*, [1893] 1 Q. B. 455). So, if an agent, under similar circumstances, sells the goods of the principal, he is liable to the trustee for the value of the goods, or for the proceeds thereof, at the option of the trustee (*King v. Leith*, 1787, 2 T. R. 141). Otherwise, if the payment is made, or the transaction takes place, before the date of the receiving order, and the agent has no notice of any act of bankruptcy (*In re Whitlock*, 1893, 63 L. J. Q. B. 245; 46 & 47 Vict. c. 52, s. 49). The payments and acts of an agent made and done before the date of the receiving order are as valid and binding on the principal's trustee in bankruptcy as they would have been upon the principal, with respect to any third person dealing with the agent for valuable consideration without notice of any available act of bankruptcy by the principal (*Ex parte Snowball*, 1872, L. R. 7 Ch. 534—conveyance of property in pursuance of a power of attorney; *Ex parte MacDonnell*, 1819, Buck, 399—contract made by agent; 46 & 47 Vict. c. 52, s. 49). As to the right of set-off in respect of mutual dealings



between the principal and agent, and the revocation of an authority given in the course of such dealings, see *Elliott v. Turquand*, 1881, 7 App. Cas. 79; *Palmer v. Day*, [1895] 2 Q. B. 618; *Naoroji v. Bank of India*, 1868, L. R. 3 C. P. 444. The bankruptcy of a principal does not revoke an authority given by him to do a mere formal act in completion of a transaction already binding on him, and which he himself, notwithstanding his bankruptcy, might be compelled to do (*Dixon v. Ewart*, 1817, 3 Mer. 322, where an agent was authorised by power of attorney to execute an indorsement of sale on the register of a ship).

*Withdrawal of Assent.*—A contract of agency may at any time be determined by the agent giving notice to the principal renouncing his authority, or, except when the authority is irrevocable, by the principal giving notice to the agent revoking the authority (*Bromley v. Holland*, 1802, 7 Ves. Jun. 28; *Venning v. Bray*, 1862, 2 B. & S. 502; *Doward v. Williams*, 1890, 6 T. L. R. 316); and where the authority is conferred by two or more principals jointly, it is sufficient if the notice of revocation or renunciation be given by or to any one of the principals (*Bristow v. Taylor*, 1817, 2 Stark. N. P. 50; 19 R. R. 675). An authority given by deed may be revoked by a verbal notice of revocation (*The Margaret Mitchell*, 1858, Swa. Ad. 382; *R. v. Wait*, 1823, 11 Price Ex. 518). The authority of an agent may be revoked by the principal, though it has been partially executed. Thus, the authority of an auctioneer to sell goods may be revoked at any time before the goods are knocked down to a purchaser (*Warlow v. Harrison*, 1859, 1 El. & El. 309; *Manser v. Back*, 1848, 6 Hare, 443), and that of a broker to buy or sell goods, at any time before the contract of purchase or sale is complete and enforceable (*Farmer v. Robinson*, 1805, 2 Camp. N. P. 338, *n.*). So, the authority of an insurance broker to effect a policy of marine insurance may be revoked after the slip has been signed by the underwriters, the contract not being binding until the execution of the policy (*Warwick v. Slade*, 1811, 3 Camp. N. P. 127; 13 R. R. 772). Authority to pay money may be revoked at any time before it is actually paid away, or the agent has become personally liable to pay it (*Taylor v. Lendey*, 1807, 9 East, 49; *Edgar v. Fowler*, 1803, 3 East, 222; 7 R. R. 433; *Taylor v. Bowers*, 1876, 1 Q. B. D. 291; *Gibson v. Minet*, 1824, 9 Moo. K. B. 31; *O'Sullivan v. Thomas*, [1895] 1 Q. B. 698).

The revocation or renunciation of an agent's authority operates without prejudice to any claim for damages that either the principal or the agent may have against the other for breach of the contract of employment. A contract of agency, however, is determinable at will, in the absence of agreement, express or implied, to the contrary (*Alexander v. Davis*, 1885, 2 T. L. R. 142; *Henry v. Lowson*, 1886, 2 T. L. R. 199; *Motion v. Michaud*, 1892, 8 T. L. R. 447). Where the principal has held out the agent as having authority to act on his behalf, he is bound by the acts of the agent, notwithstanding the revocation of the authority, with respect to any third person dealing with him on the faith of such holding out, without notice of the revocation, third persons, in such a case, being entitled to assume that the authority will continue until they receive notice of its determination (*Trueman v. Loder*, 1840, 11 Ad. & E. 589; *Stavelly v. Uzielli*, 1860, 2 F. & F. 30; *Aste v. Montague*, 1858, 1 F. & F. 264; *Marsden v. City and County Assurance Co.*, 1865, L. R. 1 C. P. 232).

See also FACTOR; BROKER; BROKER (INSURANCE); AUCTIONEER; ESTATE AND HOUSE AGENT.

[*Authorities.*—Bowstead on *Agency*, 2nd ed.; Story on *Agency*; Evans on *Principal and Agent*; Campbell on *Commercial Agency*.]



## Principal and Surety.

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CONTRACT OF PRINCIPAL AND SURETY.—The contract of principal and surety, sometimes called the contract of guarantee, has been defined and treated of at length under the title GUARANTEE, and for the law on the subject generally and the rights and liabilities of the parties to such a contract, it will be sufficient to refer the reader to that article, restricting ourselves here to dealing only with the rights of principal and surety *inter se*.

WHO IS A SURETY.—Surety in the unrestricted and proper sense of the term includes anyone who, whether gratuitously or for a consideration, is liable to answer for the debt or default of another; the other person is primarily liable, and is called the principal. There is no privity of contract between principal and surety, and consideration between them is therefore unnecessary.

RIGHTS OF SURETY AGAINST PRINCIPAL.—*Before Payment*.—The rights of the surety against the principal may arise and be enforced even before actual payment of the debt by the surety. He is entitled, as soon as the principal has made default, if the creditor refuses to sue, to go to a Court of Equity, and with its aid compel the debtor to pay off the debt, and discharge his liability (*Antrobus v. Davidson*, 1817, 3 Mer. 568; 17 R. R. 130; *Wooldridge v. Norris*, 1868, L. R. 6 Eq. 410).

*Right of Indemnity*.—Further, the relationship of principal and surety implies in the law a contract by the principal to indemnify the surety for any damage he may sustain from such relationship (*Toussaint v. Martinnant*, 1787, 2 T. R. 100). And equity will compel specific performance of this contract to indemnify—or, in other words, will enforce the surety's right of indemnity—even before there has been any such breach of the contract as would be necessary to support an action at law. The surety is "entitled to be relieved from liability; . . . he need not pay, and perhaps ruin himself, before seeking relief" (*Johnson v. Salvage Association*, 1887, 19 Q. B. D. 458).

Although, in accordance with the doctrine in *Wooldridge v. Norris* (*supra*), it may be laid down as an accepted proposition that the surety need not have actually paid anything in order to be entitled to an indemnity from the principal, nevertheless there are cases wherein the Court has refused to give an indemnity before the contingency which creates the damage has arisen—looking upon the claim of the surety as merely a *quia timet* action, which demands an indemnity against a liability that may never come into existence. On this principle, the Court has refused to declare prospectively the right of the assignor of a long lease to be indemnified by the assignee against future breaches of covenant by the latter (*Lloyd v. Dimmack*, 1877, 7 Ch. D. 398), and also to compel a *cestui-que trust* to indemnify his trustee against calls on shares in a company in liquidation,



there being no evidence to show whether calls were likely to be made in the winding-up (*Hughes-Hallett v. Indian Mammoth Gold Mines Co.*, 1882, 22 Ch. D. 561). But in spite of the two decisions (both of Fry, J.) above noticed, the Courts in several recent cases have leant very strongly in favour of giving the surety an early right of indemnity. The last-quoted case was distinguished in *Hobbs v. Wayett*, 1887, 36 Ch. D. 256, the trustee in that case being declared to be entitled to an indemnity in respect of calls on shares of a company in liquidation, and on which calls would be made on the shareholders, even though the surety was not yet on the list of contributories, and no call had as a fact been made; "I think that a man who accepts a liability," said the Court, "and who is therefore entitled to be indemnified directly the cloud appears, . . . however small that cloud may be, is entitled to go to the man who made the request [*i.e.* that the liability should be accepted], and say, 'I am entitled to be indemnified'; and if the right to indemnity is denied, he has a right to come to this Court and obtain a declaration that he or his testator's estate is entitled to be relieved from that liability" (per Kekewich, J., *loc. cit.* at p. 259). The principle, as last stated, is further supported by the recent decision in *Wolmershausen v. Gullick*, [1893] 2 Ch. 574, that a surety, against whom the principal creditor has obtained judgment for the full amount of the guarantee, may even before actual payment demand contribution from his co-sureties, a question with regard to which there had hitherto been, as stated in the judgment, a remarkable absence of express authority. The allowance of the claim of the principal creditor against the estate of the deceased surety is, for the purpose of the right to indemnity, considered as equivalent to a judgment.

It has been clearly laid down that, at all events in equity, the right of indemnity may be exercised against liability as well as loss; see *Lacey v. Hill*, 1874, L. R. 18 Eq. 182, where Jessel, M. R., said:

It is said this is a liability as distinguished from an annual payment, and that the agent or person entitled to be indemnified has no remedy. Whatever may be the case at law (as to which I say nothing, because it is not necessary), it is quite plain that in this Court anyone having a right to be indemnified, has a right to have a sufficient sum set apart for that indemnity. It is not very material to consider whether he is entitled to have that sum paid to him, or whether it must be paid direct over to the creditor. If the creditor is not a party, I believe that it has been decided that the party seeking indemnity may be entitled to have the money paid over to him. As to the observation that he may compromise for less, the answer is, that the person liable to indemnify can go to the creditor and set him right.

And it has been held recently, that in the case of an executor who is surety for an unpaid debt of his testator, the right of indemnity belonging to him as surety creates an equitable debt, in respect of which he may exercise the right of retainer (*In re Giles, Jones v. Pennefather*, [1896] 1 Ch. 956).

**RIGHT OF SURETY AFTER PAYMENT.**—Once the surety has discharged the debt of his principal, or any part of it, he becomes a creditor of the principal for the amount paid. The money paid having been paid at the request and for the use of the principal, is recoverable as such. "The surety has a right of action against the principal the moment he pays anything for so much money paid to the latter's use" (*Davies v. Humphreys*, 1840, 6 Mee. & W. 153), and he may recover not only the sum paid, but also (by way of damages) interest thereon. The surety's right to reimbursement is both just and well established, being subject only to the well-known rule of law, that if a man voluntarily discharges the obligation of another, he has no right of action against the person originally liable. Applying this rule to cases of principal and surety, payment of a debt may be VOLUNTARY not



only as regards the sum paid, but the time of such payment; in other words, the surety may not accelerate payment by paying the debt before it is due. Not only will the consent, actual or constructive, of the principal suffice to prevent the payment by the surety from being "voluntary" within the above rule, but it must be noticed further, that once the relationship of principal and surety has been established at the principal's request, the surety in discharging the obligation is taken to have acted on the implied authority of the principal, and such principal must indemnify or reimburse him, as the case may be. And the surety may, on being sued by the creditor, bring in his principal as a THIRD PARTY (see PARTIES). The IMPLIED AUTHORITY may arise from a well-recognised custom, *e.g.* it being proved to be the common and almost invariable practice of bill-brokers in the City of London not to endorse each bill of exchange which they have discounted for a customer when they rediscount with their bankers, but to give to the bankers a general guarantee for all bills which they rediscount, the drawer of an accommodation bill has an implied authority from the acceptor in discounting the bill with bill-brokers to deal with them in the ordinary course of business, and accordingly the bill-brokers have an implied authority from the acceptor to make themselves liable under their guarantee to their bankers. The surety having, on behalf of his principal the acceptor, entered into the engagement, it enures for his benefit, and thereupon, if it turns out that he must pay under his guarantee, he becomes the creditor of the principal (*Ex parte Bishop, In re Fox, Walker & Co.*, 1880, 15 Ch. D. 400).

It has been clearly established that the rights of the creditor and the right of the surety as against the principal debtor are not identical. The Mercantile Law Amendment Act, 1856, the provisions whereof have been referred to under GUARANTEE, abolished so much of the distinction as was prejudicial to the surety by giving him the benefit of the creditor's securities (*cp. Copis v. Middleton*, 1823, Turn. & R. 224, deciding that the surety was only a simple contract creditor, though the original creditor may have been so by specialty). But, on the other hand, the surety may have rights as against the principal which the creditor never had, and may accordingly be entitled to recover more under his contract of indemnity than the creditor might have recovered. And therefore, the rights being distinct, although according to the rule in *Kendal v. Hamilton*, 1879, 4 App. Cas. 504, a creditor who has recovered judgment against one partner cannot sue another partner, the rule does not take away the rights of a surety for one partner as against another partner (*Badeley v. Consolidated Bank*, 1886, 34 Ch. D. 536).

In considering whether the right to stand in the place of a creditor was or was not the surety's only right, Stirling, J., said: "That right no doubt exists, but it is simply a part of the general right of indemnity which exists on the part of the principal debtor towards his sureties. But I think it is clear from various considerations that they have further rights. First of all they have the right to indemnity, and I take it that if a surety could prove that by reason of the non-payment of the debt he had suffered damage beyond the principal and interest which he had been compelled to pay, he would be entitled to recover that damage from the principal debtor. This shows, therefore, that more can be recovered by the surety under the contract of indemnity than could be recovered by the creditor" (*Badeley v. Consolidated Bank, loc. cit.* at p. 556).

RIGHTS OF SURETY ON BANKRUPTCY OF PRINCIPAL.—Under *the early law of bankruptcy* the surety could only prove against the estate of



the principal in respect of such debt as he had actually discharged and paid off before the bankruptcy. An Act of 49 Geo. III. c. 121, and subsequently the Bankruptcy Act, 1849, remedied the injustice, by providing that any person who at the time of issuing the fiat or filing a petition for adjudication of bankruptcy shall be surety or liable for any debt of the bankrupt, if he shall have paid the debt or any part thereof in discharge of the whole debt (although he may have paid the same after the issuing of the fiat or filing of the petition), shall, if the creditor shall have proved his debt under the bankruptcy, be entitled to stand in the place of such creditor as to the dividends and all other rights under the bankruptcy which such creditor possessed or would be entitled to with respect to such proof. If the creditor shall not have proved, then such surety is to be entitled to prove his demand in respect of such payment as a debt under the bankruptcy not disturbing the former dividends, and may receive dividends with the other creditors, although he may have become surety after an act of bankruptcy committed by the bankrupt, provided he had done so without notice of the act of bankruptcy (see 12 & 13 Vict. c. 106, s. 173).

*The Bankruptcy Act*, 1883, contains no provisions on the subject apart from the general effect of the 37th section of the Act, and accordingly it is on that section that the right to prove in respect of a debt unpaid must be based. The early law on the subject is thus briefly stated in Baldwin on *Bankruptcy*, 7th ed., p. 445:—

“Under the earlier bankruptcy law, at all events, a surety was not entitled to prove until the whole debt was satisfied, either by payment in full or by payment of part in discharge of the whole. It was not, however, necessary that the surety should pay the whole; it was sufficient if he paid all that remained due” (*Ex parte Johnson*, 3 De G., M. & G. 218; *Ex parte Copplestone*, 4 Deac. 54). The reason why the surety had beyond these cases of actual payment no right to prove was that otherwise the bankrupt's estate would be exposed to the risk of having a double proof in respect of the same debt. But we apprehend that now, at all events, where there is no risk of such double proof being made, a surety may, in view of the recent decisions, prove against the principal's estate even before payment made in respect of his contingent liability (see *Ex parte Delmar*, *In re Herepath*, 1890, 38 W. R. 752; 7 Mor. 129, 190; *Wolmershausen v. Gullick*, [1893] 2 Ch. 514). The decision already noticed held further, that under sec. 37 of the Bankruptcy Act, 1883, the liability of a bankrupt co-surety to contribution in respect of an unpaid debt is, though unascertained at the time of the bankruptcy proceedings, a debt proveable in bankruptcy. And in the more recent case of *In re Paine*, *Ex parte Read*, [1897] 1 Q. B. 122, it was held that the word “creditor” in the section of the Act (s. 48) avoiding payments by way of fraudulent preference, means any person who at the date of the payment is entitled if bankruptcy supervenes to prove in the bankruptcy and share in the distribution of the bankrupt's estate; and accordingly a payment to or for the benefit of a surety before he has been called upon to pay as surety may be a fraudulent preference. The decision therefore assumes that a surety has a right under sec. 37 of the Act to prove in respect of his contingent liability. In *Ex parte Delmar*, *In re Herepath and Delmar*, 1890, 38 W. R. 752, the actual question was raised as to whether a person in the position of surety for the bankrupt could prove against the bankrupt's estate before he had been called upon to pay the money for which he was thus liable, and the Court disposed of the case by merely declaring that the surety was entitled to prove for some-



thing, and left it to be determined for what amount the proof should stand, merely deciding that the liability of the bankrupt principal was a proveable liability in respect of which proof of some kind could be tendered. But it has been held under rule 9 of Schedule 1 to the Bankruptcy Act, 1883, which provides that a creditor shall not vote at the first meeting of creditors "in respect of any unliquidated or contingent debt, or any debt, the value of which is not ascertained," that a surety for a bankrupt is not entitled to proof for the purpose of voting at such meeting unless he has actually paid the debt for which he is surety (*Ex parte Whittaker, In re Parrett*, 1891, 39 W. R. 400).

**RIGHTS OF SURETY ON DEATH OF PRINCIPAL.**—A surety who paid off the debt of his deceased principal, even though after death, might in the same way as a creditor bring an action for *administration* of the principal's estate (*Williams v. Jukes*, 1864, 34 L. J. P. & M. 60; *Williams on Executors*, 381). And it may be added, that by virtue of the provisions of the Mercantile Law Amendment Act already referred to, a surety to the Crown being entitled "to stand in the place of the creditor and to use all his remedies," is entitled to the Crown's priority in the administration of his principal estate (*In re Lord Churchill, Manisty v. Churchill*, 1888, 39 Ch. D. 174).

**RETAINER OF EXECUTOR-SURETY.**—A surety executor has a right of retainer against assets of his principal. The case of *In re Giles*, [1896] 1 Ch. 956, above noticed, may be taken as laying down the rule that an executor-surety having a right of indemnity for an unpaid debt of his testator's estate, there is an equitable debt in respect of which he has a right of retainer; and in an administration action he does not lose his right of retainer by delay merely, if such delay can be explained, or by paying the assets into Court or to a receiver, so long as there are assets against which he can exercise the right. But see in *In re Harrison*, 1886, 32 Ch. D. 395, distinguished in *In re Giles, supra*.

**SURETY OF MORTGAGOR.**—The relationship of principal and surety, where the two join in a mortgage, requires special notice. The circumstances under which a surety will be discharged have been fully dealt with under **GUARANTEE** (see vol. vi. at p. 110). Two recent cases on the subject of a mortgagee's rights against a surety for the mortgagor, illustrate the necessity for precaution by a mortgagee who wishes to reserve his rights against the mortgagor's surety. In *Bolton v. Beckenham*, [1891] 1 Q. B. 278, the mortgagor and a third party as his surety covenanted to pay the principal on a given date. By a subsequent deed this mortgage and various others were consolidated, the mortgagee taking an assignment of the mortgage debt and mortgaged premises expressly with the full benefit of the covenants contained in the several mortgage deeds, and the mortgagor covenanting to pay the full sum on a new date. The surety was not a party to the consolidating deed, and it was held that the covenant in the second deed necessarily implied that the mortgagor could not be sued in respect of the first mortgage till the time fixed for payment in the consolidating deed, and accordingly there had been a giving of time to the principal debtor, whereby the surety was discharged from liability; the new covenant for payment being held to be inconsistent with the old. And in *Bolton v. Salmon*, [1891] 2 Ch. 48, it was held further under the same circumstances, that the surety is not only discharged from personal liability, but also any property which the surety charges as security is likewise released. It is prudent, therefore, in mortgages of this class to insert a proviso that the surety shall be liable as a principal debtor, and also to



make him and the debtor enter into the covenants jointly and severally with the mortgagee. And as between the mortgagor and his surety the true relationship may be made to continue by providing that as between themselves the principal debtor shall be primarily liable. See, for examples, *Key and Elphinstone*, 5th ed., vol. ii. p. 113.

[For authorities on the subject of principal and surety, see references at the end of article GUARANTEE; and in connection with mortgages, see *Robbins' Law of Mortgages*, vol. i. ch. ix. "Of Suretyship."]

**Principal Challenge.**—See JURY.

**Principal Engineer.**—See ENGINEER, 10.

**Principal Mansion House.**—The lord's chief dwelling-house within his fee, otherwise called the *capital mesuage* or manor place (Cowel).

By the Settled Land Act, 1890, s. 10, it is provided with respect to the principal mansion house as follows:—

(1) From and after the passing of this Act, sec. 15 of the Act of 1882, relating to the sale or leasing of the principal mansion house, shall be and the same is hereby repealed.

(2) Notwithstanding anything contained in the Act of 1882, the principal mansion house (if any) on any settled land, and the pleasure grounds and park and lands (if any) usually occupied therewith, shall not be sold, exchanged, or leased by the tenant for life without the consent of the trustees of the settlement or an order of the Court.

(3) Where a house is usually occupied as a farmhouse, or where the site of any house and the pleasure grounds and park and lands (if any) usually occupied therewith do not together exceed twenty-five acres in extent, the house is not to be deemed a principal mansion house within the meaning of this section.

See FAMILY MANSION HOUSE.

**Principal Money.**—The term "money" by itself will usually be construed to mean money proper, that is, cash actually in hand (*Williams v. Williams*, 1877, 8 Ch. D. 789), but "principal money" means all a person's capital, that is, all his money's worth (*Prichard v. Prichard*, 1870, L. R. 11 Eq. 232). See also WILL, *Judicial Glossary*. See also PRINCIPAL SUM, with which the phrase "principal money" is often used as synonymous (cp. *Real and Personal Advance Co. v. Clears*, 1888, 20 Q. B. D. 304; *Bianchi v. Offord*, 1886, 17 Q. B. D. 484).

**Principal Sum.**—A sum of money is usually styled principal in contradistinction to collateral sums connected therewith, such as interest, charges, etc. So under the form in the Bills of Sale Act Amendment Act, 1882, 45 & 46 Vict. c. 43, s. 9, a fixed sum must be stated as the amount secured which, with interest calculated up to the time when the principal shall be called in, can be recovered by the grantee. And by sec. 7 (1) default in payment of the principal sum warrants seizure under the bill of sale. The above provision is so stringent that a bill of sale cannot be made to cover further advances of an uncertain amount (*Cook v. Taylor*, 1887, 3 T. L. R. 800), or by way of indemnity where the amount ultimately to fall due is uncertain (*Hughes v. Little*, 1886, 18 Q. B. D. 32). And it has been



held that there must be no attempt to alter the sum secured, and that nothing must be added to it except by way of rateable interest (*Davis v. Burton*, 1883, 11 Q. B. D. 537).

In other cases, however, principal sum may not be a fixed sum. Thus if a covenant or indemnity is given by way of collateral security for principal and interest secured by mortgage, and said covenant or indemnity contains a stipulation that no greater principal sum shall be ultimately recoverable under it than a sum named, the phrase "principal sum" there does not mean "no greater sum in respect of the principal secured by the mortgage," but the amount to be recovered under the covenant or indemnity (*Miller v. Miller*, 1886, filed in H. L. Sess.). Where an annuity was bequeathed and an investment in the funds directed to secure it, and power was given to the legatee to appoint the annuity so bequeathed, it was held that the power extended to the principal sum invested, there being evidence that such was the testator's intention (*Samuda v. Lousada*, 1843, 7 Beav. 243).

**Printed Cases.**—See APPEALS, vol. i. at p. 272; PRINTING.

**Printers.**—The following statutory provisions are applicable to printers:—

Any person who shall print any paper for hire, reward, gain, or profit must carefully preserve and keep one copy (at least) of every paper so printed by him, on which he shall write or cause to be written or printed in fair and legible characters, the name and place of abode of the person by whom he is employed, under penalty for neglecting to do so, or refusing to produce the paper to any Justice of the Peace who shall require to see it, of £20 (39 Geo. III. c. 79, s. 29; 32 & 33 Vict. c. 24, Sched. 4).

Penalties not exceeding £20 may be recovered in a summary way (s. 35).

Proceedings under this Act shall not be commenced unless in the name of the law officers of the Crown (9 & 10 Vict. c. 33, s. 1). Every printer must print in legible characters his name and address in the first and last leaf of every book or paper intended to be published, under penalty of not more than £5 for every copy (2 & 3 Vict. c. 12, s. 2), except in the case of books or papers printed at the University Press of Oxford, or the Pitt Press of Cambridge, where the printer, instead of his name, must print the following words:—"Printed at the University Press, Oxford," or "The Pitt Press, Cambridge," as the case may be (s. 3). Actions for penalties must be commenced in the name of the Attorney- or Solicitor-General of England, or the Queen's Advocate in Scotland (s. 4).

Nothing in these Acts extends to any papers printed by the authority and for the use of either House of Parliament (39 Geo. III. c. 79, s. 28), or to the impression of any engraving, printing by letterpress of the name, or name and address or business or profession of any person, and the articles in which he deals, or to any papers for the sale of estates or goods by auction or otherwise (s. 31); nor is the name and address of the printer required to be printed on bank notes, bills, etc., nor upon any proceeding in law or equity, nor on any paper printed by authority of any public board or public office (51 Geo. III. c. 65, s. 3). The Acts extend to pamphlets.

Printing is a trade which must be carried on with prudence and caution; for if anything libellous be printed it is no excuse to say that the printer had no knowledge of the contents, and was entirely ignorant of its being libellous (per Lord Hardwicke in *Printer of the Champion v. Printer of the St. James' Evening Post*, 1742, 2 Atk. 469).

In an action brought against the editor and printer of *Fraser's Magazine*, both were held liable for a libellous lithographic print, which, though not struck off by the printer, was referred to in the letterpress of one of the articles (*Watts v. Fraser and Moyes*, 1835, 7 Car. & P. 369). And a printer



whose name appears as publisher on the imprint of a newspaper, although only a foreman printer engaged at a weekly salary and having no means of knowing the contents of the paper, may be committed for contempt of Court for publishing therein statements relating to matters in dispute in an action pending (*American Exchange in Europe v. Gillis and Others*, 1889, 5 T. L. R. 721).

With regard to printers' lien, a printer who is employed to print certain numbers, but not all consecutive numbers, of an entire work, has a lien upon the copies not delivered for his general balance due for printing the whole of those numbers (*Blake v. Nicholson*, 1814, 3 M. & S. 167; 15 R. R. 455).

But in the case of a stereotype printer, who claims a lien on stereotype plates not manufactured by him, it is necessary to show a course of dealing so general and uniform that persons must be supposed to form their contracts tacitly on the understanding of such a usage (*Bleaden v. Hancock*, 1829, 4 Car. & P. 152).

By general usage a printer is not entitled to be paid for any part of his work until the whole is completed and delivered. This custom controls the general law that a workman is entitled to be paid for his labour where the work is destroyed, without any fault of his own, before it is completed or delivered to the employer (*Gillett v. Mawman*, 1808, 1 Taun. 137).

It is not the custom of the London trade for the printer to insure the publisher's price (2 Taun. 325; Comyns, *Digest*, "Printer").

[*Authorities*.—Shortt's *Copyright and Libel*, 2nd ed.; Fisher and Strahan's *Law of the Press*, 1891.]

**Printing.**—The printing of documents is regulated, as to the Supreme Court, by Order 66.

Proceedings required to be printed shall be printed on cream wove machine drawing foolscap folio paper, 19 lbs. per mill ream or thereabouts, in pica type leaded, with an inner margin about three-quarters of an inch wide, and an outer margin about two inches and a half wide.

Every pleading not being a petition or summons must be printed if it consists of more than ten folios (Order 19, r. 9).

Amendments to indorsements on pleadings, if requiring the insertion of more than 144 words in any one plea, or so numerous or of such a nature that the making of them in writing would render the document difficult or inconvenient to read (*John v. Lloyd*, 1 Ch. 64), must be made by delivering a print of the document as amended.

Any affidavit may be sworn to either in print or in manuscript, or partly in print and partly in manuscript (Order 66, r. 4). When evidence under Order 38 is taken by affidavit, such evidence shall be printed (r. 30).

An affidavit in answer to interrogatories shall, unless otherwise ordered by a judge, if exceeding ten folios, be printed (Order 66, r. 7); but the Court will dispense with printing in a proper case (*Webb v. Bornford*, 46 L. J. Ch. 288).

Where any written deposition of a witness has been filed, such deposition shall be printed, unless otherwise ordered (Order 66, r. 5).

For the purpose of appeal, where evidence has not been printed in the Court below, the Court below or the Court of Appeal may order the whole or any part thereof to be printed for the purpose of the appeal (*Bigsby v. Dickinson*, 4 Ch. D. 24) (Order 53, rr. 11, 12).

Every special case shall be printed by the plaintiff, and signed by the several parties or their counsel or solicitors, and shall be filed by the



plaintiff. Three printed copies for the use of the judges shall be left therewith (Order 34, r. 3).

Where by order of the Court or a judge any document is ordered to be printed, the Court or judge may make an order as to expense of printing upon such terms as shall be thought fit (Order 66, r. 7).

**Print Works.**—See FACTORIES AND WORKSHOPS, vol. v. at pp. 302, 303.

**Prior Charges; Incumbrancers.**—See PRIORITIES; MORTGAGE.

**Prior Invention; Publication; User.**—See DESIGNS; PATENTS.

**Priorities.**—The two great maxims of equity with reference to the doctrine of priorities are—(1) “Where equities are equal the law prevails”; and (2) “*Qui prior est tempore potior est jure.*” The second of these is often misunderstood, and the mistake is the more easily obviated by remembering that it must be taken in connection with and as subservient to the first. Accordingly, it means nothing more than that in a case of conflicting equities, all other the respective rights of the parties being equal, he who is first in point of time is entitled to be preferred by the Court—and the principle applies only as between parties having no other than equitable interests, and even then is the last test resorted to. The first maxim, on the other hand, has a far more extensive application, and is the basis of the doctrines concerning the protection afforded by the possession, and also the right to call for the possession, of the legal estate. The chief instance of this is the protection of a purchaser for value *bonâ fide* and without notice getting in the legal estate at the time of the purchase against any equitable claim of another party. And a purchaser for value and without notice, even if he subsequently acquire the legal estate, and though, during the interval between payment and getting in the legal estate, he may have had notice of some prior dealing inconsistent with the good faith of the dealing with himself, is nevertheless protected against other claims. To this rule there is the well-known exception, “that you cannot make use of the doctrine of *tabula in naufragio* by getting in a legal estate from a bare trustee after you have received notice of a prior equitable claim” (per Jessel, M. R., in *Harpham v. Shacklock*, 1882, 19 Ch. D. 207, quoted in *Taylor v. Russell*, [1891] 1 Ch. 8 (*q.v.*); [1892] App. Cas. 244). The notice in this case is constructive notice, for where there is a term in gross the expressed object of which has been satisfied, the term is, according to the doctrine of equity, held on trust for the successive equitable interests according to their priorities. Consequently, the subsequent equitable owner who gets in the legal estate gets it subject to the equity of the prior equitable owner, and may not set up the legal estate against such owner.

The law as to the relative force of the two maxims has been recently stated in *Bailey v. Barnes*, [1894] 1 Ch. 25, by the Court of Appeal—

The maxim *Qui prior est tempore potior est jure* . . . . is in our law subject to an important qualification, that where equities are equal, the legal title prevails.



Equality, here, does not mean to refer to priority in point of time, as is shown by the cases on tacking. Equality means the non-existence of any circumstance which affects the conduct of one of the rival claimants, and makes it less meritorious than that of the other. Equitable owners who are upon an equality in this respect may struggle for the legal estate, and he who obtains it, having both law and equity on his side, is in a better situation than he who has equity only. The reasoning is technical and not satisfactory; but as long ago as 1728 the law was judicially declared to be well settled, and only alterable by Act of Parliament (see *Brace v. Duchess of Marlborough*, 2 P. Wms. 491).

The doctrine as above stated applies not only to cases of tacking, but to every case where an equitable owner or incumbrancer for value without notice of prior equitable interests gets in the legal estate from one who, in parting with the legal estate, commits no breach of trust.

The cases in which the acquisition of the legal estate will give a subsequent innocent equitable mortgagee priority over a prior mortgagee have been considered by the House of Lords in *Taylor v. Russell*, [1892] App. Cas. 244. In that case the mortgagor mortgaged the estate in question twice over, once by forged deeds. On the forgery being discovered, the second equitable mortgagee had the legal estate conveyed to him, and the Court held that there was nothing to show that the second equitable mortgagee had acted inequitably in getting in the legal estate, and that there was no equity which prevented him from availing himself of its protection, and that he was entitled to priority over the first equitable mortgagee.

Having dealt with the relative force of the two primary rules embodied in these maxims as to priorities, we have still to consider the effect of the maxims separately. The law on the subject is inseparable from the law of mortgages and notice, and the reader should refer to MORTGAGE, NOTICE, and LEGAL ESTATE for more general information. We propose here to discuss only certain well-established principles laid down in the more recent cases for determining what circumstances are sufficient for depriving the party of the right of priority that the maxims respectively confer—*i.e.* *Firstly*, what circumstances as between an owner of the legal estate and an equitable incumbrancer will deprive the former of his right of priority. *Secondly*, as between equitable incumbrancers and where the maxim *Qui prior est tempore potior est jure* would apply, what circumstances will nevertheless postpone the rights of a person who is prior in time.

And, *firstly*, as to the legal being postponed to the equitable owner. The case of *Northern Counties of England Fire Insurance Co. v. Whipp*, 1884, 26 Ch. D. 482, wherein Fry, L.J., delivered the joint judgment of the Court of Appeal, may well be considered the leading case on this question. From the authorities therein reviewed the following rules are deduced:—

I. The Court will postpone the prior legal estate to a subsequent equitable owner only in the case of fraud or negligence so gross as to amount to fraud. These are classed as cases—“(a) where the owner of the legal estate has assisted in or connived at the fraud which has led to the creation of a subsequent equitable estate without notice of the prior legal estate; of which assistance or connivance the omission to use ordinary care in inquiry after or keeping title-deeds may be, and in some cases has been, held to be sufficient evidence where such conduct cannot otherwise be explained.

“(b) Where the owner of the legal estate has constituted the mortgagor his agent, with authority to raise money, and the estate thus created has by the fraud or misconduct of the agent been represented as being the first estate.”

II. Mere carelessness or want of prudence on the part of the owner of



the legal estate is not a ground for postponing him to the subsequent equitable estate.

The cases as to omission to use ordinary care in (1) inquiry after or (2) keeping title-deeds may, following the arrangement in the case cited, be thus classified—

*As to Inquiry.*—(1) Where no inquiry at all is made by the owner of the legal estate about the title-deeds, he will be postponed to a prior equitable charge, for the omission to inquire is sufficient evidence within the rule of an intention to escape notice of the prior equitable charge. For instances, see *Spencer v. Clarke*, 1878, 9 Ch. D. 137; *Clarke v. Palmer*, 1882, 21 Ch. D. 124; *Lloyds Banking Co. v. Jones*, 1885, 29 Ch. D. 221.

(2) Where inquiry is made by the legal owner, and a reasonable excuse is given for the absence of the deeds, he retains his priority, for there is a satisfactory explanation of his conduct (*Agra Bank v. Barry*, 1874, L. R. 7 H. L. 135; *Manners v. Mew*, 1885, 29 Ch. D. 725). And similarly, where the legal owner receives part only of the deeds under a reasonable belief that he was receiving all, this is not such an omission to inquire as to show a fraudulent intention (*Ratcliffe v. Barnard*, 1871, 6 Ch. D. 652), and he does not lose his priority.

(3) “Where the legal mortgagee has left the deeds in the hands of the mortgagor, with authority to deal with them for the purpose of his raising money on the security of the estate, and he has exceeded the collateral instructions given to him,” the legal mortgagee has been postponed, on the ground that the mortgagor, being intrusted with possession of the title-deeds, the owner cannot insist, as against persons who lend their money, that the mortgagor has exceeded his authority. This is the doctrine in *Perry-Herrick v. Attwood*, 1857, 2 De G. & J. 21; 25 Beav. 205. The doctrine is based upon the clear principle that where a person is intrusted with the possession of title-deeds, with authority to raise money upon them, the owner of the deeds cannot take advantage of any limitation in point of amount which he placed upon the authority to raise money as against a lender who had no notice of it. Accordingly, it applies to principal and agent (*Brocklesby v. Temperance Building Society*, [1895] App. Cas. 173), and to the case of two equitable incumbrancers, in spite of priority in point of time, quite apart from any fraud or negligence equivalent to fraud (see *In re Castell & Brown*, [1898] 1 Ch. 315, and *infra*).

*As to Negligence in keeping the Title-Deeds.*—Where the deeds are lent by the mortgagee upon a reasonable representation, he retains his priority (*Martines v. Cooper*, 1826, 2 Russ. 198; 26 R. R. 49); but where he returns them with the express purpose of money being raised, the same principle applies as in the case where they are originally left in the mortgagor’s hands (*Briggs v. Jones*, 1870, L. R. 10 Eq. 92); and this is the case even though the mortgagee directly and expressly told the mortgagor to disclose to any subsequent incumbrancer the existence of his mortgage, the reason being that the legal owner puts it in the mortgagor’s power to raise any money he pleases. “To hold that a person who advances money on an estate the title-deeds of which are under such circumstances left in the hands of the mortgagor is not to have preference, would be to shut our eyes to the plainest equity” (per Lord Cranworth, L.C., in *Perry-Herrick v. Attwood*, 1858, 2 De G. & J. 21, 39; *Briggs v. Jones*, *ubi supra*). On the other hand, where the misconduct of the mortgagor is the sole cause of the mortgagee’s parting with the deeds, the latter does not lose his priority, *e.g.* where a mortgagor, under pretence of obtaining money to pay off mortgages, obtained the deeds from one of the mortgagee’s executors, who was



tenant for life under the mortgagee's will, and subsequently sent back a parcel purporting to contain the deeds, but which, as was discovered on the death of the tenant for life, did not contain certain title-deeds, these having been deposited by the mortgagor with a bank, it was held that the surviving executor, who was also a reversioner, was entitled to priority over the bank and delivery of the title-deeds (*In re Ingham, Jones v. Ingham*, [1893] 1 Ch. 352).

We will now consider the second branch of the subject, namely, as between equitable incumbrancers merely, and where the maxim *Qui prior est tempore potior est jure* applies, what circumstances will nevertheless postpone the rights of him who is prior in time.

It has been stated that between two persons whose equitable interests are identical in nature and quality, and there is the difference of time only, possession of the deeds will override the priority of time (cp. *Rice v. Rice*, 1853, 2 Drew. 73, 81; *Lloyds Banking Co. v. Jones*, *ubi supra*, at p. 229). But there must be some default on the part of the person having priority of time whereby the deeds fail to be in his possession in order so to postpone him, although the amount of negligence in the case of conflicting equities need not be of the nature that is required to postpone the owner of a legal estate (*Taylor v. Russell*, [1892] App. Cas. 244). In the case of *In re Richards*, 1890, 45 Ch. D. 589, it was held that where a client's solicitor represented to him that he had invested money for him on mortgage, whereas the mortgage was as a fact in the solicitor's own name, and the solicitor subsequently deposited the deeds with his bankers as security for an advance, this was not sufficient negligence to deprive the client of a prior equity, the solicitor being a trustee of the mortgage for the client. Cp. *Carrit v. Real and Personal Advance Co.*, 1889, 42 Ch. D. 263, quoted in that case, where it was held that a solicitor who took a mortgage in the name of his clerk, and left the deeds in the latter's possession, was not postponed to persons taking a title from the clerk—a much stronger case.

But where an equitable incumbrancer leaves title-deeds so as to enable money to be raised thereon, he loses his priority quite apart from any question of fraud or negligence, but on the principles above stated in the case of similar conduct by an owner of the legal estate. Accordingly, if the debenture holders of a company leave the title-deeds of some of its property with the company, so as to enable it to deal with its property as if it had not been incumbered, and the company deposits the title-deeds with an equitable mortgage, they cannot set up their prior charge against the equitable mortgage (*In re Castell & Brown*, [1898] 1 Ch. 315). In this case the debenture was to be a floating security, but so that the company should not create any charge on its realty or leaseholds in priority to the debentures; and when the equitable mortgage, which was to the company's bankers, was made, the bank had no notice of the existence of the debentures, and made no inquiries, and it was none the less held that the bank was entitled to priority over the debenture holders.

All allusion to tacking and notice has purposely been omitted, this part of the subject being fully dealt with under TACKING and the articles to which reference has already been made.

**Prior; Priory.**—Priories, of which there were many in England before the Reformation, were societies of monks or nuns, the chief of whom was termed prior or prioress. A priory might be either independent, or a cell dependent on some abbey. The name of prior was also given to the



officer of an abbey ranking next after the abbot; and in abbeys attached to cathedrals the prior was practically the head of the community, as the bishop was the abbot (see ABBEY).

**Prisage.**—(1) The ancient right of the Crown to take toll of wines imported into England. Originally it was exercised by the purchase, below its value, of as much as the king required, but in course of time it took the form of a toll of one tun out of every cargo of from ten to twenty tuns, and of two tuns out of every cargo above twenty tuns, commuted by Edward I., in the case of alien importers, for a duty of 2s. per tun. When thus commuted it was called “butlerage,” from being paid to the king’s butler, and it was levied in addition to tonnage (*q.v.*). The duty seems to have been granted by Charles II. to the Duke of Grafton, and 43 Geo. III. c. 156, 1803, reciting that the then duke claimed it at all ports in England, with the exception of those in the Duchies of Cornwall and Lancaster, Liverpool, and Plymouth, the king, as Duke of Lancaster, at Liverpool and the Lancaster ports; the Prince of Wales, as Duke of Cornwall, at the Cornish ports and Plymouth; the Duke of Beaufort, at Swansea and Chepstow; and Lord Bute at Cardiff; empowered the Treasury to arrange with their possessors for the purchase of these rights. An agreement so made with the Duke of Grafton was confirmed by 46 Geo. III. c. 79, and 49 Geo. III. c. 98, ss. 35, 36, 1809, enacted that wine should not thenceforward be admitted to prisage in any ports where the right had been purchased, and that butlerage and composition money for it should cease. A similar agreement with the Duchy of Lancaster was confirmed by 2 & 3 Will. IV. c. 84, s. 40, 1832, and one with Lord Ormonde for the purchase of the right of prisage and butlerage in Ireland by 50 Geo. III. c. 101, 1810, the duties being abolished in Ireland by 51 Geo. III. c. 51, 1811. For the present duties on wine, see CUSTOMS.

(2) The sovereign’s or Lord High Admiral’s share in a vessel lawfully captured at sea. It is said that this is the meaning of “prisage” in 31 Eliz. c. 5, s. 4, 1589; see the Black-Book of the Admiralty (Rolls series), vol. i. pp. 151, 173, 399.

[*Authorities* (for (1)).—Madox, *History and Antiquities of the Exchequer*, 1769; Dowell, *History of Taxation in England*, 1884; Hall, *History of the Customs Revenue of England*, 1892.]

**Prison.**—In the earliest days of English law gaols were not used. The offenders were either executed or put into private custody. See BAIL; MAINPRISE. In the reign of Henry II. the Assizes of Clarendon and Northampton made provision for the establishment of a gaol in every county, where the sheriff could put his prisoners; and directed that they should be placed in the king’s castles or in great towers. Private prisons, however, existed for manorial jurisdictions and other liberties and franchises, into which the king’s sheriff could not enter, and were filled by the bailiffs of franchise. But in theory they were the king’s prisons in the keeping of subjects (2 Co. *Inst.* 100, 705).

In consequence of abuses by constables of royal castles it was enacted in 1402 (5 Hen. IV. c. 10) that justices of the peace should imprison only in the common gaol for their jurisdiction. This Act did not, however, affect franchise prisons, *i.e.* those of manors or boroughs and liberties, or of ecclesiastical dignitaries; but from this date the expression “common gaol” has



continued to be an integral part of the law of England. Imprisonment in gaol for safe custody lasted only till the next sessions of the peace or of a Court of gaol delivery, according to the commitment. But it had long been the practice, and by some judges is held the duty, of the Court of assize to deliver the gaol of all persons held there for trial whether at assizes or Quarter Sessions; and subject to the Assizes Relief Act, 1889, it is the duty of the gaoler to supply to the Assize Court a calendar of all prisoners in his custody awaiting trial. See CALENDAR OF PRISONERS.

The old gaol was a place of imprisonment only, and no labour could be exacted from prisoners till the creation of Houses of CORRECTION. The legislation of the seventeenth and eighteenth centuries provided for the building of better gaols and houses of correction, as a county charge, and for the supervision and management of the gaols (see Burn, *Justice*, 17th ed., 1793, tit. "Gaol").

During the present century a complete change in the system of control and management of local prisons has been effected. As to prisons for persons sentenced to penal servitude, see PENAL SERVITUDE.

The Prison Act, 1865, enacted a complete code for the regulation of all local prisons, *i.e.* prisons in counties, boroughs, or franchises, maintained and controlled by local authorities. The law as to gaols as it stood after this Act is fully dealt with in Burn, *Justice*, 30th ed., tit. "Gaol." Houses of correction were then abolished. See CORRECTION, HOUSE OF. In 1877 (40 & 41 Vict. c. 21) all prisons in England other than convict prisons (see PENAL SERVITUDE) were transferred from the local authority to the Crown. Gaols had always been described as those of the king when used for offenders against his peace. In 1877 (40 & 41 Vict. c. 21) central administration had taken the place of local; and the only local supervision is that of the visiting justices selected by the justices for the districts for which the prison is used.

The orders appointing particular prisons for use as the common gaol of particular counties, boroughs, or other areas, and the orders regulating the dietary and treatment of prisoners (1) under sentence for crime, (2) civil, (3) untried, are collected in the Statutory Rules and Orders, Revised, vol. v. tit. "Prison." Under a bill of the session of 1898 it is proposed to recast all these rules.

Each prison is inspected by visiting justices appointed by the Quarter Sessions of the counties or boroughs for which it is used, subject to rules made by the Secretary of State.

Detention in prison, to be legal, must be in the manner and for the term authorised by the warrant of committal or sentence of the Court.

Committals for trial or under sentence are to the prisons appointed as above. Prisoners committed for trial may not be removed from the prison to which they are committed except (1) by writ of *habeas corpus*; (2) by judge's order when they are in the gaol which is being delivered under the commission of gaol delivery under which the judge is acting (30 & 31 Vict. c. 35, s. 10); or (3) by order of a Secretary of State (16 & 17 Vict. c. 30, s. 9; see Prisons Bill, 1898, cl. 10).

Inquests must be held on all prisoners who die in prison (3 Co. *Inst.* 52). See CORONER.

As to convict prisons, see PENAL SERVITUDE.

As to naval prisons, see NAVY. Naval prisons are appointed and regulated by the Admiralty under the Naval Discipline Act, 1866 (29 & 30 Vict. c. 109). The declarations fixing the prisons up to 1890 are printed in Statutory Rules and Orders, Revised, vol. v. p. 77.



As to military prisons, see MILITARY CUSTODY.

As to Queen's prison, see QUEEN'S PRISON.

"Criminal prisoners," *i.e.* persons charged with or convicted of crime (28 & 29 Vict. c. 126, s. 4), include for purposes of prison treatment persons committed for criminal contempt of Court (*Osborne v. Milman*, 1887, 18 Q. B. D. 471), or in default of distress for non-payment of a fine under the Vaccination Act (*Kennard v. Simmons*, 1883, 15 Cox C. C. 397).

**Prison Breach; Breaking.**—Escape from prison or breach of prison was at common law treated as a confession of guilt (Bracton, *de Coroná*, f. 124; 1 Hale, P. C. 607; 1 Seld. Soc. Publ. p. 100, pl. 154, 155, p. 134, pl. 201). In 1295 (23 Edw. I.) it was enacted that no one should have judgment of life and member for breaking prison only, except the cause for which he was taken and imprisoned did require such judgment if he had been convicted thereof. This enactment appears to be the authority for the doctrine that where the accused is detained for felony, the breaking out is to be felony; where for misdemeanour, it is a misdemeanour. To constitute this offence, there must be some actual breaking of the prison (*R. v. Haswell*, 1821, Russ. & R. 458); but going out by an open door was the misdemeanour of escape. To the common law punishment for mere escape from lawful custody on a criminal charge, hard labour can now be added (14 & 15 Vict. c. 100, s. 29). The common law was concerned rather with prisoners in custody for trial than with those imprisoned in execution of sentence; but it covered every legal place of confinement (2 Co. *Inst.* 587).

There are also statutory provisions dealing with escape or breaking out of prison by persons held in execution.

1. Under the Vagrancy Act, 1824 (5 Geo. IV. c. 83, s. 5), persons who escape out of any place in which they are legally confined under the Act before the expiration of the term of imprisonment are dealt with as incorrigible rogues.

2. Persons under sentence of transportation or penal servitude found at large without licence during its currency are guilty of felony (5 Geo. IV. c. 84, s. 22; 4 & 5 Will. IV. c. 67; 16 & 17 Vict. c. 99, ss. 7, 8; 20 & 21 Vict. c. 3, ss. 2, 3, 6); and if they are found in a British possession outside the United Kingdom they can be dealt with under the Fugitive Offenders Act, 1881.

3. Breaking out of Pentonville or Parkhurst prisons is specially punished (1 & 2 Vict. c. 82, s. 12; 5 & 6 Vict. c. 29, s. 24) by an addition to their term of imprisonment for a first escape, or felony on a second escape.

The assistance of prisoners to escape from prison is dealt with under RESCUE; and see ESCAPE.

[*Authorities.*—Hawk. P. C. bk. ii.; Russell on *Crimes*, 6th ed.; Steph. *Dig. Cr. Law*, 5th ed., art. 170.]

**Prisoner of War.**—See WAR.

**Private Arrangements.**—See BANKRUPTCY, vol. i. at p. 528; FAMILY ARRANGEMENT.



## Private Bill Legislation.

[NOTE.—*In this Article, Standing Orders of the House of Lords are cited as "L. S. O.," and those of the House of Commons as C. S. O.; and where an Order of the one House is practically identical with an Order of the other House of the same number, it is cited as S. O. simply.*]

*Definition and Classification of Private Bills.*—A private bill is a bill for the particular interest or benefit of any person or persons, as distinguished from a measure of general public policy intended for the benefit of the community at large. Bills which only concern a particular city or borough, or other district or locality, must generally be introduced as private bills, as well as those for the interest or benefit of a particular corporation or company, such as railway and canal bills, and those for the interest or benefit of particular individuals, such as estate and divorce bills. Bills affecting the whole metropolitan area have, however, frequently been introduced and treated as public bills, on account of the magnitude of the area, and the extent of the interests involved.

In dealing with private bills, Parliament exercises judicial as well as legislative functions. The proceedings at certain stages closely follow those of a Court of Law, the promoters and opponents of the measure being permitted to appear by counsel, and to adduce evidence in support of their respective contentions, and being required to pay fees as in the case of ordinary litigation.

Where it appears after the first reading of a public bill, that the bill affects private rights, it is examined with respect to compliance with the Standing Orders, as in the case of a private bill; and after the second reading, it is committed to a select committee, which may be empowered to hear suitors, and their counsel and witnesses, for and against the bill, in the same manner as if it had been introduced as a private bill; and when it has been reported from such committee, it is re-committed to a committee of the whole House, and is subsequently treated as a public bill. Such a bill is called a hybrid bill, and is subject to the payment of the fees payable in respect of private bills.

For the purposes of the Standing Orders of the House of Commons, all private bills to which the Standing Orders are applicable, except estate, divorce, naturalisation, and name bills, are divided into the two following classes, according to the subjects to which they respectively relate:—

### 1st Class:—

- Burial ground, making, maintaining, or altering.
- Charters and corporations, enlarging or altering powers of.
- Church or chapel, building, enlarging, repairing, or maintaining.
- City or town, paving, lighting, watching, cleansing, or improving.
- Company, incorporating, regulating, or giving powers to.
- County rate.
- County or shire hall, court-house.
- Crown, church, or corporation property, or property held in trust for public or charitable purposes.
- Ferry, where no work is to be executed.
- Fishery, making, maintaining, or improving.
- Gaol or house of correction.
- Gas work.
- Improvement charge, unless proposed in connection with a second-class work to be authorised by the bill.
- Land, inclosing, draining, or improving.
- Letters patent.
- Local court, constituting.



Market or market-place, erecting, improving, repairing, maintaining, or regulating.  
Police.

Poor, maintaining or employing.

Poor rate.

Powers to sue and be sued, conferring.

Stipendiary magistrate, or any public officer, payment of.

And continuing or amending an Act passed for any of the purposes included in this or the second class, where no further work than such as was authorised by a former Act is proposed to be made.

*2nd Class :—*

Making, maintaining, varying, extending, or enlarging any—

Aqueduct.

Archway.

Bridge.

Canal.

Cut.

Dock.

Drainage—where it is not provided in the bill that the cut shall not be more than 11 feet wide at the bottom.

Embankment for reclaiming land from the sea or any tidal river.

Ferry, where any work is to be executed.

Harbour.

Navigation.

Pier.

Port.

Public carriage road.

Railway.

Reservoir.

Sewer.

Street.

Subway—to be used for the conveyance of passengers, animals, or goods, in carriages or trucks drawn or propelled on rails.

Tramway—by which term, as used in the Orders, is meant a tramway to be laid along a street or road.

Tramroad—by which term, as used in the Orders, is meant any tramway other than a tramway to be laid along a street or road.

Tunnel.

Waterwork.

The Standing Orders of the House of Lords classify private bills as “personal bills” and “local bills,” subdividing local bills into two classes practically identical with the two classes into which private bills are divided in the Standing Orders of the House of Commons, as detailed above (L. S. O. 1). The term “personal bills” in the Standing Orders of the House of Lords includes all estate, divorce, naturalisation, and name bills, and all other private bills not specified in Order 1 as local bills (L. S. O. 149).

The expressions “personal bills” and “local bills” are not used in the Standing Orders of the House of Commons; and estate, divorce, naturalisation, and name bills, all of which must be originated in the Upper House, are not included in either of the classes into which private bills are divided by those Orders. Provisions are, however, made with respect to the bills which are described in the Orders of the Upper House as personal bills, by Standing Orders 188 b–192 and 211 of the House of Commons (see PERSONAL ACT).

All private bills must be intrusted to, and be solicited by, a parliamentary agent, who is responsible to Parliament for the observance of the rules, orders, and practice of Parliament, and for the payment of the fees (see PARLIAMENTARY AGENT).

*Steps to be taken before Introduction of Bill.*—Before any bill of either



of the classes into which private bills are divided by the Standing Orders of the House of Commons, and which, in the Standing Orders of the House of Lords, are styled local bills, is introduced into Parliament, notices have to be given, by advertisement and otherwise, and deposits made, in accordance with the Standing Orders of both Houses; and for the purpose of ascertaining whether the provisions of such Standing Orders have or have not been complied with, officers called Examiners are appointed, whose duties are to examine all petitions for private bills, and to certify by indorsement on each petition whether the Standing Orders have or have not been complied with, and, when they have not been complied with, to report to the House the facts upon which the decision is founded, and any special circumstances connected with the case (C. S. O. 2, 71; L. S. O. 2, 76). The sittings and proceedings of the Examiners are regulated by C. S. O. 69-78, and L. S. O. 70-79 (see *post*).

In all cases where application is intended to be made for leave to bring in a bill of either of the two classes, notice must be given stating the objects of such intended application, and the time at which copies of the bill will be deposited in the Private Bill Office, and containing the particulars specified in Standing Orders 3-8 of both Houses.

In the months of October and November, or either of them, immediately preceding the application for the bill, such notice must be published in the *London, Edinburgh, or Dublin Gazette*, as the case may be, and also in newspapers circulating in the districts particularly concerned, in accordance with the provisions of S. O. 9; and all of such publications must be made on or before the 27th day of November (S. O. 9). In the case of a bill relating to letters patent, the notice must also be published twice in the official journal of the Patent Office, before the introduction of the bill into Parliament (S. O. 8*a*); and in the case of a bill for laying down a tramway, or constructing an underground railway or subway, when such bill contains powers authorising an alteration or disturbance of the surface of any street or road, notice thereof must also be posted for fourteen consecutive days in a conspicuous position in every such street or road (S. O. 10).

Where the bill contains powers authorising any lands or houses to be taken compulsorily, or imposes an improvement charge on any lands or houses, application in writing must, on or before the 15th day of December immediately preceding the application for the bill, be made to the owners or reputed owners, lessees or reputed lessees, and occupiers of all such lands and houses, inquiring whether they assent, dissent, or are neuter in respect of such application; and separate lists must be made of the names of such owners, lessees, and occupiers, distinguishing those who have assented, dissented, or are neuter in respect to such application, or who have returned no answer in respect thereto (S. O. 11, 12). And in certain other cases, notices must be served on the owners, lessees, and occupiers of lands, houses, and other properties which are likely to be affected or interfered with in carrying out the objects of the bill (S. O. 13-18). Such notices may be served, and applications made, either by delivering the same personally to the party entitled to such notice or application, or by leaving the same at his usual place of abode, or by forwarding the same by post in a registered letter, addressed to such place of abode (S. O. 19-21).

In cases of bills to authorise the laying down of a tramway, the promoters must obtain the consent of the local authority of the district or districts through which it is proposed to construct such tramway; and where in any district there is a road authority distinct from the local authority, the consent of such road authority must also be obtained if



power is sought to break up any road subject to the jurisdiction of such road authority (S. O. 22).

In cases of bills of the second class, a plan and also a duplicate thereof, together with a book of reference thereto, and a section and also a duplicate thereof, and in cases of bills of the first class, under the powers of which any lands or houses may be taken compulsorily, and in the case of all bills by which any charge is imposed upon any lands or houses, or any lands or houses are rendered liable to have a charge imposed upon them in respect of any improvement, a plan and duplicate thereof, together with a book of reference thereto, must be deposited for public inspection at the office of the Clerk of the Peace for every county in or through which the work is proposed to be made, maintained, varied, extended, or enlarged, or in which such lands or houses are situate, on or before the 30th day of November immediately preceding the application for the bill; and in the case of railway bills, a map, with the line of railway delineated thereon, so as to show its general course and direction, must be deposited with such plans, sections, and book of reference; and in cases of bills whereby it is proposed to alter or extend the municipal boundary of any city, borough, or urban district, a map and duplicate thereof, showing the present boundaries as well as the boundaries of the proposed extension, must be deposited for public inspection with the town clerk of such city or borough, or clerk of such urban district (S. O. 24).

On or before the 30th day of November, a copy of such plans, sections, books of reference, and, in the case of a railway bill, also a copy of the map, with the line of railway delineated thereon, must be deposited in the Private Bill Office and in the office of the Clerk of the Parliaments (S. O. 25); and in the case of a railway, tramway, subway, or canal bill, must also be deposited in the office of the Board of Trade (S. O. 27). And in the case of a tramway bill, a map of the district, with the line of the proposed tramway marked thereon, must also be deposited at the office of the Board of Trade (S. O. 25 *a*). In cases where the work is to be situate on tidal lands, a copy of the plans and sections, accompanied by a map of the country over which the works are proposed to extend, must be deposited at the office of the Harbour Department, Board of Trade; and in cases where the work is to be situate on the banks, foreshore, or bed of any river, at the office of the conservators of the river (S. O. 26, 26 *a*). A copy of so much of the plans, sections, and book of reference as relates to particular parishes and districts, must also be deposited with the local authorities of such parishes and districts, in accordance with the provisions of Standing Orders 28 and 29.

The form in which the plans and sections required to be deposited are to be prepared is prescribed in great detail by Standing Orders 40–45 *b* and 47–55. The book of reference must contain the names of the owners or reputed owners, lessees or reputed lessees, and occupiers of all lands and houses which may be taken compulsorily, or upon which any improvement charge is or may be imposed, and must describe such lands and houses respectively (S. O. 46).

Wherever any plans, sections, and books of reference, or parts thereof, are required by the Standing Orders to be deposited, a copy of the notice published in the Gazette of the intended application to Parliament must be deposited therewith (S. O. 31).

A printed copy of every local bill proposed to be introduced into either House must be deposited in the office of the Clerk of the Parliaments on or before the 17th day of December (L. S. O. 32).

Every petition for a private bill in the House of Commons, headed by a



short title descriptive of the undertaking or bill, corresponding with that at the head of the advertisement, with a declaration, signed by the agent, and a printed copy of the bill annexed, must be deposited for public inspection in the Private Bill Office on or before the 21st day of December; and printed copies of the bill must also be delivered therewith for the use of any member of the House or agent who may apply for the same (C. S. O. 32). Such declaration must state to which of the two classes of bills such bill in the judgment of the agent belongs; and if the proposed bill gives power to effect any of the following objects; that is to say:—

Power to take any lands or houses compulsorily, or to extend the time granted by any former Act for that purpose:

Power to levy tolls, rates or duties, or to alter any existing tolls, rates, or duties; or to confer, vary, or extinguish any exemption from payment of tolls, rates, or duties, or to confer, vary, or extinguish any other right or privilege:

Power to amalgamate with any other company, or to sell or lease their undertaking, or to purchase or take on lease the undertaking of any other company:

Power to interfere with any Crown, church, or corporation property, or property held in trust for public or charitable purposes:

Power to relinquish any part of a work authorised by a former Act:

Power to divert into any existing or intended cut, canal, reservoir, aqueduct, or navigation, or into any intended variation, extension, or enlargement thereof respectively, any water from any existing cut, canal, reservoir, aqueduct, or navigation, whether directly or derivatively, and whether under any agreement with the proprietors thereof, or otherwise:

Power to make, vary, extend or enlarge any cut, canal, reservoir, aqueduct, or navigation:

Power to make, vary, extend, or enlarge any railway:

the declaration must state which of such powers are given by the bill, and indicate in which clauses of the bill such powers are given, and must further state that the bill does not give power to effect any of such objects, other than those stated in the declaration. If the proposed bill does not give power to effect any of such objects, the declaration must state that it does not do so. And the declaration must also state that the bill does not give any powers other than those included in the notices for the bill (C. S. O. 32).

On or before the 21st day of December, a printed copy of the bill must be deposited at the office of the Treasury, and at the General Post Office, and also at the offices of certain other public departments and authorities, according to the subject to which the bill relates (S. O. 33–34 a).

An estimate of the expense of the undertaking under each bill of the second class must be made and signed by the person making the same (S. O. 56); and, subject to certain exceptions, a deposit of not less than 5 per cent. in the case of a railway, tramway, or subway bill, and of not less than 4 per cent. in the case of any other bill, on the amount of such estimate, must before the 15th day of January be deposited with the Paymaster-General; provided that where the work is to be made out of surplus revenue under the control of the promoters, a declaration stating that fact, with particulars, or, where the work is to be made out of money to be raised upon the security of rates, duties, or revenue already belonging to or under the control of the promoters, a declaration stating those facts, with particulars, together with an estimate of the probable amount of such rates, duties, or revenue, may be deposited, and in such cases no money deposit is required (S. O. 57, 58, 59; and see PARLIAMENTARY DEPOSITS). As to the form of the estimate in the case of a railway, tramway, tramroad, subway, canal, dock, or harbour bill, see S. O. 37.

Copies of the estimate of expense, and where a declaration alone, or



declaration and estimate of the probable amount of rates are required, copies of such declaration, or of such declaration and estimate, must be printed at the expense of the promoters of the bill, and delivered at the office of the Clerk of the Parliaments for the use of the House of Lords, and at the Vote Office for the use of the members of the House of Commons, and at the Private Bill Office for the use of any agent who may apply for the same (L. S. O. 36 ; C. S. O. 36); and in the case of a bill for incorporating a joint-stock company, there must also be deposited in the Private Bill Office the documents mentioned in C. S. O. 35 *a*.

All estimates, declarations, and lists of owners, lessees, and occupiers which are required by the Standing Orders must be deposited in the Private Bill Office, or in the office of the Clerk of the Parliaments, as the case may be, on or before the 31st day of December (C. S. O. 35 ; L. S. O. 35).

*Introduction of the Bill into Parliament.*—Bills which, in the Standing Orders of the House of Lords, are termed “personal bills” are always originated in the Upper House. They are brought in upon a petition for leave to bring in the bill, with a printed copy of the proposed bill annexed ; and such petition must be signed by one or more of the parties principally concerned in the consequences of the bill (L. S. O. 150, 151). The proceedings in relation to personal bills are governed by Standing Orders 150–181 of the House of Lords, and by Standing Orders 188 *b*–192 and 211 of the House of Commons (see PERSONAL ACT).

Bills of either of the two classes into which private bills are divided by the Standing Orders of the House of Commons, and which in the Standing Orders of the House of Lords are called “local bills,” may be originated in either House. No such bill may be brought into the House of Commons but upon a petition first presented, which has been duly deposited in the Private Bill Office, and indorsed by one of the Examiners, with a printed copy of the proposed bill annexed ; and such petition must be signed by the suitors for the bill, or some of them (C. S. O. 193). And no such bill for which a petition has not been presented in the House of Commons may be brought into the House of Lords except on petition for leave to bring in the bill, with a printed copy of the proposed bill annexed (L. S. O. 86).

By constitutional usage the House of Commons has the exclusive right to impose taxation, and, generally speaking, bills which impose any pecuniary charge on the people, must originate in that House. It is, however, provided by S. O. 226 of the House of Commons, that the House will not insist on its privileges with regard to any clauses in private bills sent down from the House of Lords, which refer to tolls and charges for services performed, and are not in the nature of a tax, or which refer to rates assessed and levied by local authorities for local purposes.

It is usual to commence private bills, other than personal bills, by petition to the House of Commons for leave to bring in the bill ; and at the commencement of each session, the Chairman of the Committee of Ways and Means seeks a conference with the Chairman of Committees of the House of Lords, for the purpose of determining in which House the respective bills shall be first considered (C. S. O. 79).

The petition must be written, and not printed nor lithographed ; must contain a prayer ; must be signed or sealed on the skin or sheet on which the prayer is written ; and must be addressed “To the Honourable The Commons of the United Kingdom of Great Britain and Ireland in Parliament assembled.” No erasures or interlineations may be made in the petition.



A list of all petitions for private bills is kept in the Private Bill Office in the order of their deposit, which is called the "General List of Petitions," and all petitions therein are numbered consecutively (C. S. O. 229). Registers are also kept, in which are entered the name and place of residence of the parliamentary agent soliciting the bill, and all the proceedings, from the petition to the passing of the bill; and such registers are open for public inspection (C. S. O. 227).

*Proceedings before the Examiners and Standing Orders Committees.*—The examination of petitions for private bills commences on the 18th of January, and the promoters of each bill, whether it is opposed or not, must prove compliance with the Standing Orders of both Houses at the time appointed by the Examiners (C. S. O. 69; L. S. O. 70).

Persons desiring to oppose any bill on the ground that the Standing Orders have not been complied with, may do so by depositing in the Private Bill Office a memorial complaining of such non-compliance. The memorial must be addressed to the Examiner of Standing Orders for Private Bills in the House of Lords, and to the Examiner of Petitions for Private Bills in the House of Commons, and must state specifically the matter complained of. Memorials complaining of non-compliance with the Standing Orders applicable previously to the introduction of bills must be deposited, if they relate to bills numbered in the general list published by the Private Bill Office, from 1 to 100, before January 9th; if they relate to bills numbered from 100 to 200, before January 16th; and if they relate to bills numbered from 201 and upwards, before January 23rd (C. S. O. 230).

As soon as the time allowed for depositing memorials has expired, the word "unopposed" is written in the general list of petitions against each petition in respect of which no such memorial has been deposited; and the petitions are set down for hearing before the Examiners in the order in which they stand in such list, precedence being given, when necessary, to unopposed petitions.

Not less than seven clear days' notice in the Private Bill Office must be given by one of the Examiners of the day appointed for the examination of each petition; and if the promoters do not appear when their petition comes on to be heard, it is struck off the general list of petitions and cannot be re-inserted except by order of the House of Commons (C. S. O. 70).

If the promoters appear, they must prove compliance with the Standing Orders, and for this purpose the Examiner may admit affidavits, or may require further evidence (C. S. O. 76; L. S. O. 77). Any parties who have duly deposited a memorial complaining of non-compliance, are entitled to appear and be heard, by themselves, their agents and witnesses (L. S. O. 73; C. S. O. 74).

After hearing the parties, it is the duty of the Examiner to certify by indorsement on the petition whether the Standing Orders have or have not been complied with; and, when they have not been complied with, to report to the House the facts upon which his decision is founded, and any special circumstances connected with the case (L. S. O. 76; C. S. O. 71). If the Examiner feels doubtful as to the construction of any Standing Order in its application to the particular case, it is his duty to make a special report of the facts, without deciding whether the Standing Order has or has not been complied with, and in such case to indorse the petition with the words "special report," either alone, or, if non-compliance with other Standing Orders has been proved, in addition to the words "Standing Orders not complied with" (C. S. O. 78; L. S. O. 78).



If the Examiner certifies that the Standing Orders have been complied with, and indorses the petition to that effect, it is returned to the agent, who must arrange for its presentation to the House of Commons by a member. If the Examiner reports that the Standing Orders have not been complied with, the report is referred in the House of Commons to the Select Committee on Standing Orders, and after the petition for the bill has been duly presented, such committee report to the House whether such Standing Orders ought or ought not to be dispensed with, and whether in their opinion the parties should be permitted to proceed with their bill, or any portion thereof, and under what (if any) conditions (C. S. O. 199, 92). So, if the Examiner makes a special report, such report is referred to the Select Committee on Standing Orders, who determine, according to their construction of the Standing Order, and on the facts stated in the report, whether the Standing Orders have or have not been complied with, and either report to the House that they have been complied with, or proceed to consider the question of dispensing with the Standing Orders, as the case may be (C. S. O. 199, 94).

Where the Examiner has reported that the Standing Orders have not been complied with, the Select Committee will accept that finding as conclusive on the question of such non-compliance; and where, in a special report, the Examiner has set forth a statement of facts, such finding will be accepted as conclusive with regard to the facts so set forth.

In the case of a special report, the party contending that the Standing Orders have been complied with, must set forth his argument in a written or printed statement, and must strictly confine himself thereto, without entering on the question of dispensation with the Standing Orders, and any opposing party may do the same, under the like limitation; and if the committee decide that the Standing Orders have not been complied with, the further consideration of the case, with a view to the question of the dispensation with Standing Orders, will be postponed to the next meeting of the committee, in order to give time for the preparation of statements relating to that question.

In all cases in which the question arises whether the Standing Orders ought or ought not to be dispensed with, the party praying for such dispensation must set forth, in a written or printed statement, the grounds on which he rests his prayer; and the opposing party must similarly set forth the grounds on which he rests his opposition; both parties confining themselves strictly to the points reported on by the Examiner, or determined by the committee on their consideration of any special report; and at the meeting of the committee both parties must deliver in their statements. When the committee think fit, they may hear the parties in explanation of their statements, and if they desire to hear arguments in addition to such statements, they may call upon the parties to argue any point before them; but only one speech will be allowed on each side, though there may be on one side several parties interested. Copies of all statements intended to be delivered in to the committee must be left with each member of the committee, at his residence, not later than three o'clock, and at the Committee Office not later than one o'clock, in the afternoon of the day preceding that fixed for the meeting of the committee.

A petition praying that any of the Sessional or Standing Orders of the House of Commons relating to private bills may be dispensed with, or opposing the same, may be presented to the House by depositing the same in the Private Bill Office; and every such petition so deposited stands referred to the Select Committee on Standing Orders (C. S. O. 200). Copies



of such petitions must be left with each member of the committee, and at the Committee Office, the day before that on which the committee is appointed to meet; and no statement will be received by the committee in addition to the case set forth in any such petition.

A committee, called "the Standing Orders Committee," is also appointed by the House of Lords, whose duties and mode of procedure are similar to those of the Select Committee on Standing Orders of the House of Commons (see L. S. O. 80-85).

If the report of the Select Committee on Standing Orders, or the Standing Orders Committee, as the case may be, is favourable to the bill, and is agreed to by the House, the House will give leave to proceed with the bill. If the report is unfavourable, and is not referred back to the committee for further consideration, the bill is lost for the session.

*Progress of Bill through House of Commons.*—It is the duty of the Chairman of the Committee of Ways and Means, with the assistance of the counsel to the Speaker, to examine all private bills, whether opposed or unopposed, and to call the attention of the House, and also of the Chairman of the Committee on every opposed bill, to all points which may appear to him to require it; and for this purpose the agent soliciting the bill is required to lay copies of the bill before such chairman and counsel not later than the day after the Examiner has indorsed the petition for the bill, and again two clear days at least before the day appointed for the consideration of the bill by a committee (C. S. O. 80, 82).

The petition for the bill must be presented to the House by a member not later than three clear days after it has been indorsed by the Examiner, or if, when the petition is indorsed, the House is not sitting, then not later than three clear days after the first sitting subsequent to such indorsement; and if the House is not sitting on the latest day on which the petition ought to be presented, it must be presented on the first day on which the House again sits (C. S. O. 195).

The petition having been duly presented, and the bill been ordered by the House to be brought in, the next step is to present the bill to the House by depositing it in the Private Bill Office, and it will then be laid on the table of the House for first reading (C. S. O. 196). The bill must be presented not later than one clear day after the presentation of the petition for leave to bring it in; or, where the petition has been referred to the Select Committee on Standing Orders, not later than one clear day after the House has given leave to proceed with the bill (C. S. O. 197). The bill must be printed, the short title corresponding with that at the head of the advertisement, and if it contains any charges in any way affecting the public revenue, such charges must be printed in italics (C. S. O. 201, 202). Printed copies of the bill must be delivered to the Vote Office for the use of the members before the first reading (C. S. O. 203).

Where the bill is promoted by a company already constituted by Act of Parliament, or by any company, society, association, or copartnership formed or registered under the Companies Act, 1862, or constituted by Royal charter, letters patent, deed of settlement, or other instrument, and under the management of a committee, directors, or trustees, it is after the first reading referred to the Examiners, to report as to the compliance or non-compliance with Standing Orders 62 and 63, which require that the bill shall be submitted to and approved of by the proprietors or members of the company, society, association, or copartnership, at a meeting specially held for the purpose (C. S. O. 62, 63; see also C. S. O. 66, 75). There are similar



requirements in the case of any such bill brought from the House of Lords, where the provisions originally contained in the bill have been added to or materially altered in that House (C. S. O. 64, 65); and when in any bill brought from the House of Lords for the purpose of establishing a company for carrying on any work or undertaking, any person is specified as manager, director, proprietor, or otherwise concerned in carrying such bill into effect, proof is required before the Examiner that such person has subscribed his name to the petition for the bill, or to a printed copy of the bill, as brought up to the House of Commons (C. S. O. 68). All petitions for additional provisions in private bills, with the proposed clauses annexed, and all private bills brought from the House of Lords, and all bills introduced by the leave of the House in lieu of other bills which have been withdrawn, after having been read a first time, are referred to the Examiners, to report as to the compliance or non-compliance with any Standing Orders which have not been previously inquired into (C. S. O. 72, 73, 77).

The first reading of a bill which has been duly presented is a matter of course, and except where, as mentioned above, the bill is to be referred to the Examiners after having been read a first time, the next stage is the second reading. The second reading takes place not less than three nor more than seven clear days after the first reading, unless the bill has been referred to the Examiners, in which case it takes place not later than seven clear days after the report of the Examiners, or of the Select Committee on Standing Orders, as the case may be (C. S. O. 204).

After the bill has been read a first time, it is in the custody of the clerks of the Private Bill Office, until laid upon the table for the second reading; and it is the duty of such clerks, between the first and second reading, to examine the bill as to its conformity with the rules and Standing Orders of the House (C. S. O. 233, 234).

Three clear days' notice in writing must be given by the agent for the bill, to the clerks in the Private Bill Office, of the day proposed for the second reading (C. S. O. 235); and if on that day the second reading is opposed, it is postponed until the day on which the House next sits (C. S. O. 207).

When the bill has been read a second time, it is at once referred to a committee; and when committed, is taken by the proper committee clerk into his charge, till reported (C. S. O. 233). It is during the consideration of the bill by the committee that parties interested in opposing it are afforded an opportunity of being heard.

The Chairman of the Committee of Ways and Means may, at any period after the bill has been referred to a committee, report to the House any special circumstances relative thereto which appear to him to require it, or inform the House that in his opinion the bill, though unopposed, should be treated as an opposed bill (C. S. O. 83).

Parties desiring to oppose any private bill must deposit a petition in the Private Bill Office not later than ten clear days after the first reading of the bill, praying to be heard, by themselves, their counsel or agents. Every such petition stands referred to the committee on the bill, and the petitioners, subject to the rules and orders of the House, will be heard upon their petition accordingly, if they think fit, and counsel heard, in favour of the bill, against such petition (C. S. O. 210). The petition must distinctly specify the ground on which the petitioners object to any of the provisions of the bill, otherwise it will not be taken into consideration by the committee on the bill; and the petitioners will only be heard on such grounds so stated; and if it appears to the committee that such grounds are not



specified with sufficient accuracy, they may require a more specific statement in writing to be delivered (C. S. O. 128).

Every petition in favour of or against the bill must be presented to the House by depositing the same in the Private Bill Office, and there must be indorsed thereon the name or short title by which the bill is entered in the votes, and a statement that such petition is in favour of or against the bill, as the case may be, together with the name of the member, or party, or agent depositing the same (C. S. O. 205). Any petitioner may withdraw his petition, by depositing in the Private Bill Office a requisition to that effect, signed by him or by the agent who deposited the petition; and where the petition is signed by more than one person, any person signing it may withdraw his opposition by a similar requisition (C. S. O. 206).

No petitioners against a private bill will be heard before the committee on the bill, unless their petition has been prepared and signed in strict conformity with the rules and orders of the House; and has been presented by having been deposited in the Private Bill Office not later than ten clear days after the first reading of the bill, except where the petitioners complain of any matter which has arisen during the progress of the bill before the committee, or of the amendments as proposed in the filled-up bill deposited in the Private Bill Office (C. S. O. 129).

The bill is considered an opposed bill if, not later than ten clear days after the first reading, a petition has been duly presented against it, in which the petitioners have prayed to be heard, by themselves, their counsel or agents, or if, when no such petition has been presented, the Chairman of the Committee of Ways and Means has reported to the House that in his opinion it ought to be treated as opposed; otherwise, it is treated as unopposed (C. S. O. 107).

If the promoters intend to object to the right of petitioners against the bill to be heard, on the ground that such petitioners have not such an interest in opposing the bill as to give them a *locus standi*, they must give notice of such intention, and of the grounds of their objection, to the clerks to the Referees, and to the agent for the petitioners, not later than the eighth day after the petition has been deposited in the Private Bill Office; provided that it is competent to the Referees to allow such notices to be given, under special circumstances, after the expiration of such time. The Referees, who form one or more Courts for the purpose, decide all questions as to the *locus standi* of opponents to private bills, except where any such question arises incidentally in the course of the proceedings of the committee on the bill (see C. S. O. 87-89). As to what is deemed to be a sufficient interest to give a *locus standi*, and as to the practice and procedure of the Referees, see REFEREES, COURT OF.

Every private bill, not being a railway, canal, or divorce bill, after having been read a second time and committed, stands referred to the Committee of Selection; and if a railway or canal bill, to the General Committee on Railway and Canal Bills; and if a divorce bill, to the Select Committee on Divorce Bills (C. S. O. 208). The Committee of Selection and General Committee on Railway and Canal Bills may form into groups all bills referred to them respectively which, in their opinion, it is expedient to refer to the same committee (C. S. O. 103). See, further, as to the functions of these committees, and as to the composition of the committees to whom it is their duty to refer opposed and unopposed bills respectively, C. S. O. 98-117, 137, and article on PARLIAMENTARY COMMITTEES.

Subject to Standing Order 211, which provides that there shall be six clear days between the second reading of every private bill and the sitting



of the committee thereon, except in the case of name, naturalisation, and estate bills, in respect of which there shall be three clear days between the second reading and the committee, the Committee of Selection and General Committee on Railway and Canal Bills respectively appoint the time for the first sitting of the committee on every bill referred to the said committees, and also name the bill or bills to be taken into consideration on the first day of the meeting of the committee on any group of bills (C. S. O. 105, 106). The committee on each group of bills take the bill or bills first into consideration which have been so named by the Committee of Selection, or by the General Committee on Railway and Canal Bills; and from time to time appoint the day on which they will enter upon the consideration of each of the remaining bills, and on which they will require the parties promoting or opposing the same to enter appearances; and two clear days' notice, at the least, of such appointment, must be given by the clerk attending the committee to the clerks in the Private Bill Office (C. S. O. 126).

Each member of the committee on an opposed bill or group of bills must, before he is entitled to attend and vote on such committee, sign a declaration that his constituents have no local interest, and that he has no personal interest, in the bill, and that he will never vote on any question without having duly heard and attended to the evidence relating thereto; and no such committee may proceed to business until such declaration has been signed by each of the members (C. S. O. 118). And no member, locally or otherwise interested, of a committee on an unopposed bill, may vote on any question which may arise, though he is entitled to attend and take part in the proceedings of the committee (C. S. O. 139).

At the first meeting of the committee, copies of the bill, as proposed to be submitted to them, signed by the agent, must be laid by him before each member of the committee (C. S. O. 138).

The usual course of procedure before the committee is for the counsel appearing in support of the bill to open his case, and then produce his witnesses in support of the allegations contained in the preamble. The witnesses may be cross-examined by the counsel for any opponents who by their petitions have taken objection to the preamble, but not by the counsel for parties who only object to particular clauses in the bill. After being cross-examined, the witnesses may be re-examined by the counsel calling them. The counsel (if any) appearing in opposition to the preamble then opens his case, and produces his witnesses, who may be cross-examined and re-examined; and the counsel for the bill is entitled to reply.

If the committee decide that the preamble has been proved, they proceed to consider the bill section by section, and clause by clause, and parties who object to particular clauses are heard. Amendments or new clauses may be proposed either by the parties or by members of the committee.

All questions before the committee are decided by a majority of voices, including the voice of the chairman; and when the voices are equal, the chairman has a casting vote (C. S. O. 125).

Whether the bill is opposed or unopposed, the Standing Orders in many cases require the committee not to permit the insertion of certain clauses, and to insist on the insertion of others, and to report specially on various matters (see C. S. O. 144–145 *a*, 148, 153–175, 179–188 *a*).

If, in the case of an opposed bill, no parties have appeared on the petitions against the bill, or the parties who have appeared have withdrawn their opposition before the evidence of the promoters has commenced, the committee must forthwith refer the bill back, with a statement of the facts,



to the Committee of Selection or General Committee on Railway and Canal Bills, as the case may be, and such bill is then dealt with as an unopposed bill (C. S. O. 136).

The bill, having been considered by the committee, must be reported to the House by the Chairman, whether the committee have or have not agreed to the preamble, or gone through the several clauses, or any of them; and when any alteration has been made in the preamble, such alteration, together with the ground of making it, must be specially stated in the report (C. S. O. 149). If the bill is reported without amendment, and is not a railway or a tramway bill, it is forthwith ordered to be read a third time; but if it has been amended in committee, or is a railway or a tramway bill, it is ordered to lie upon the table for subsequent consideration (C. S. O. 213).

Where the bill is ordered to lie upon the table, it must be printed as amended in committee, at the expense of the promoters, and three clear days at least before the consideration of the bill copies thereof must be delivered to the Vote Office for the use of members, and be laid before the Chairman of the Committee of Ways and Means and the counsel to the Speaker, and be deposited at the office of the Treasury, at the General Post Office, and at the office of the Board of Trade (C. S. O. 84, 214).

When it is intended to bring up any clause or to propose any amendment on the consideration of the bill, or to propose any verbal amendment on the third reading, notice must be given thereof, in the Private Bill Office, one clear day previous to such consideration or third reading; and such clause or amendment must be printed, and must be submitted by the agent to the Chairman of the Committee of Ways and Means and the counsel to the Speaker, on the day on which notice thereof is given in the Private Bill Office (C. S. O. 85, 217, 242).

In the case of bills ordered to lie upon the table, three clear days must intervene between the report and the consideration of the bill; and no consideration of any such bill will take place, unless the Chairman of the Committee of Ways and Means has informed the House, or signified in writing to the Speaker, whether the bill contains the provisions required by the Standing Orders (C. S. O. 215); and no clause or amendment may be offered in the House on the consideration of the bill, nor any verbal amendment on the third reading of any private bill, unless such Chairman has informed the House, or signified in writing to the Speaker, whether, in his opinion, such clause or amendment is such as ought or ought not to be entertained by the House, without reference thereof to the Select Committee on Standing Orders (C. S. O. 216). When any such clause or amendment is referred to the Select Committee on Standing Orders, they report to the House whether the clause or amendment should be adopted by the House or not, or whether the bill should be recommitted (C. S. O. 97); and no further proceeding may be taken until their report has been brought up (C. S. O. 218). If the bill is recommitted, a filled-up bill, as proposed to be submitted to the committee on recommitment, must be deposited in the Private Bill Office two clear days before the meeting of the committee; and a copy of the proposed amendments must be furnished by the promoters to such parties petitioning against the bill as apply for it one clear day before the meeting of the committee (C. S. O. 237).

One clear day's notice must be given to the clerks of the Private Bill Office of the day proposed for the third reading of the bill, and such notice may not be given until the day after that on which the bill has been ordered to be read a third time (C. S. O. 243). No amendments, not being merely verbal, may be made on the third reading (C. S. O. 219).



When the bill has been read a third time, it must be printed fair, at the expense of the promoters; and after having been examined by the clerks in the Private Bill Office, it is, if it originated in the House of Commons, sent up to the House of Lords (C. S. O. 221, 245). If it is a bill brought from the House of Lords, a message is sent to that House stating that the bill has been passed, with or without amendments, and if with amendments, desiring the concurrence of the House of Lords thereto.

All amendments made by the House of Lords to a bill sent up from the Commons must be printed at the expense of the parties, and circulated with the votes, prior to such amendments being taken into consideration; and when any amendments are intended to be proposed to the Lords' amendments, such proposed amendments must also be printed (C. S. O. 220). A copy of all such amendments, and proposed amendments thereto, must be laid by the agent before the Chairman of the Committee of Ways and Means and the counsel to the Speaker, before two o'clock on the day previous to that on which they are respectively appointed for consideration by the House (C. S. O. 86).

*Progress through House of Lords.*—It is not necessary to present any petition to the House of Lords for leave to bring in a local bill sent up from the Commons, or for which a petition has been presented to the House of Commons, and which, by arrangement between the Chairman of the Committee of Ways and Means and the Chairman of Committees of the House of Lords, is to be first considered in the Upper House. But no local bill for which a petition has not been presented in the House of Commons may be brought into the House of Lords except on petition for leave to bring in such bill (L. S. O. 86).

The bill must be presented to the House by one of the Lords, and will be read a first time after the Examiner has certified whether the Standing Orders have or have not been complied with; and in the case of a bill originating in the House of Lords, the first reading will be not later than three clear days after the certificate of the Examiner has been laid on the table (L. S. O. 86 *a*).

Where the bill has been brought from the House of Commons, it will, after the first reading, be referred to the Examiners, to certify as to the compliance or non-compliance with any Standing Orders which have not been previously inquired into (L. S. O. 70 *a*, 87). Standing Orders 60 and 60 *a* require that copies of bills brought from the House of Commons shall, in certain cases, be deposited at the offices of public departments; and whenever, in the case of a bill of the second class, any alteration has been made in the work authorised by the bill, during its progress through the House of Commons, proof must be given before the Examiners that notice of the alteration has been advertised, and plans and sections deposited, and the making of the alteration consented to, as provided by Standing Order 61. Where the bill is promoted by a company, proof must also be given before the Examiner, before the second reading, that the requirements of Standing Orders 62–66 and 68 have been complied with. These Orders, as well as Orders 3–59, are practically identical with the corresponding Orders of the House of Commons (see *ante*).

One of the Examiners will give at least two clear days' notice of the day on which the bill will be examined (L. S. O. 72); and parties who have duly deposited memorials, complaining of a non-compliance with the Standing Orders, are entitled to appear and be heard (L. S. O. 73, 74). Every such memorial must be deposited, together with two copies thereof, in the office of the Clerk of the Parliaments before twelve o'clock on the day preceding that appointed for the examination (L. S. O. 75).

If the Examiner certifies that the Standing Orders have not been com-



plied with, or makes a special report, such certificate or report is referred to the Standing Orders Committee, and such committee report to the House whether the Standing Orders ought or ought not to be dispensed with, or, in case of a special report, whether they have or have not been complied with, and if not, whether they ought to be dispensed with (L. S. O. 83, 84).

The bill will not be read a second time earlier than the fourth day nor later than the seventh day after the first reading, except where it has been referred to the Examiners after the first reading, in which case it will be read a second time not later than the fourteenth day after the first reading, and if the Examiner has certified that the Standing Orders have not been complied with, then not later than the second day on which the House sits after the report from the Standing Orders Committee recommending that the bill be allowed to proceed (L. S. O. 91).

No petition praying to be heard against the bill will be received unless it is deposited in the Private Bill Office, in the case of a bill originating in the House of Lords, on or before the seventh day after the second reading, and in the case of a bill brought from the House of Commons, on or before the seventh day after the first reading (L. S. O. 92, 93).

The effect of the second reading is to affirm the principle of the bill, subject to proof of the allegations in the preamble, and as in the House of Commons, the bill, after being read a second time, is immediately committed. If opposed, it is referred to a select committee of five Lords, nominated by the Committee of Selection (see PARLIAMENTARY COMMITTEES); and if unopposed, to the Chairman of Committees, "and such lords as think fit to attend" (L. S. O. 96, 97; May's *Parl. Prac.* p. 801).

The Chairman of Committees may report that any unopposed bill on which he sits as chairman should be proceeded with as an opposed bill (L. S. O. 95).

The proceedings and functions of the committee are similar to those of the committee on the bill in the House of Commons (see L. S. O. 103–140 *a*); and as in the House of Commons, the committee are required by the Standing Orders to insist on the insertion of certain clauses and restrictions (see L. S. O. 107–134, 137–140 *a*). A petitioner against a bill originating in the House of Commons, who has discussed clauses of the bill in that House, is not on that account precluded from opposing the preamble of the bill in the House of Lords (L. S. O. 102 *a*). In the House of Lords, all questions of *locus standi* are decided by the committee on the bill (see L. S. O. 105–105 *c*).

If any amendments have been made in committee, the bill must be reprinted, as amended, previously to the third reading, unless the Chairman of Committees considers the reprinting to be unnecessary (L. S. O. 145); and a copy of the bill, as amended, must be deposited at the Treasury and at the General Post Office, and in the case of a railway, tramway, tramroad or subway bill, also at the office of the Board of Trade, three days before the bill is read a third time (L. S. O. 143, 143 *a*).

No amendment may be moved on the report or third reading, unless it has been submitted to the Chairman of Committees, and copies of the amendment deposited in the office of the Clerk of the Parliaments one clear day at least prior to the report or third reading of the bill (L. S. O. 144).

When the bill has been read a third time, it is, if it originated in the House of Lords, sent to the House of Commons. If it is a bill brought from the House of Commons, a message is sent to that House, stating that the bill has been passed, with or without amendments, and if with amendments, desiring the concurrence of the House of Commons thereto.

When the bill as brought from the one House is passed by the other



House without amendment, or when the amendments made by either House are agreed to by the other, the bill is ready for the Royal assent.

As to the introduction and passing of personal bills, see L. S. O. 149-181; C. S. O. 188*b*-192; and see PERSONAL ACT.

*Costs.*—The Act of 28 & 29 Vict. c. 27 gives power to committees on private bills, in certain cases, to award costs to the promoters or opponents thereof. The taxation and payment of the costs of parliamentary agents and solicitors employed in promoting or opposing private bills are regulated by the House of Commons Costs Taxation Act, 1847 (10 & 11 Vict. c. 69), and the House of Lords Costs Taxation Act, 1849 (12 & 13 Vict. c. 78).

When the committee on a private bill decide that the preamble is not proved, or when they insert, strike out, or alter any provision in the bill, for the protection of any petitioner, and further unanimously report that any petitioner has been unreasonably or vexatiously subjected to expense in defending his rights, such petitioner is entitled to recover from the promoters his costs in relation to the bill, or such portion thereof as the committee think fit, such costs to be taxed by the Taxing Officer of the House, or the committee may award such a sum for costs as they think fit, with the consent of the parties affected (28 & 29 Vict. c. 27, s. 1). When the committee decide that the preamble is proved, and further unanimously report that the promoters of the bill have been vexatiously subjected to expense in the promotion thereof by the opposition of any petitioners against the same, then the promoters are entitled to recover from the petitioners, or such of them as the committee think fit, such portion of their costs of the promotion of the bill as the committee think fit, to be taxed by the Taxing Officer of the House, or such a sum for costs as the committee name, with the consent of the parties affected. But no landowner, who *bonâ fide* at his own sole risk and charge opposes a bill which proposes to take any portion of his property for the purposes of the bill, is liable to any costs in respect of his opposition to such bill (*ibid.* s. 2).

The Taxing Officer is required, on application, to tax the costs and deliver to the parties affected a certificate of the amount, or in cases where a sum for costs has, by consent, been named by the committee, to deliver a certificate expressing the sum so named, with the name of the party liable to pay, and the name of the party entitled to receive the same; and such certificate is conclusive evidence as well of the amount of the demand as of the title of the party therein named to recover the same (*ibid.* s. 3).

Where an action is brought for the recovery of costs in respect of which such a certificate has been given, it is sufficient for the plaintiff to allege in his statement of claim that the defendant is indebted to him in the sum mentioned in the certificate, and upon filing such statement of claim, together with the certificate and an affidavit of the demand, the plaintiff is entitled to sign judgment for the amount, unless the defendant has obtained leave from the Court to deliver a defence. The defendant cannot deliver a defence to such an action without leave of the Court, whether on the ground that the committee had no jurisdiction to order him to pay the costs or otherwise. But the Court may set aside the judgment and give leave to defend, or may give leave to deliver a defence before judgment is signed, on the ground that the committee had no jurisdiction in the particular case (*Mallet v. Hanley*, 1887, 18 Q. B. D. 303; 28 & 29 Vict. c. 27, s. 5). Where a company petitioned against a bill, and the committee ordered certain directors of the company to pay a portion of the costs of the promoters, on the ground that such directors were substantially the petitioners, it was held that



such order was made without jurisdiction and was not enforceable, the directors not being the actual petitioners (*Mallet v. Hanley*, 1887, 18 Q. B. D. 787).

No parliamentary agent or solicitor can maintain any action for the recovery of any costs, charges, or expenses in respect of proceedings in either House relating to a private bill, until the expiration of one month after a signed bill of costs has been delivered or sent to the party to be charged; provided that a judge of the High Court may authorise the commencement of an action before the expiration of a month from the delivery of the bill of costs, on proof that there is probable cause for believing that such party is about to quit the United Kingdom (10 & 11 Vict. c. 69, s. 2; 12 & 13 Vict. c. 78, s. 2).

The Speaker and the Clerk of the Parliaments (or in his absence the Clerk Assistant) respectively appoint the Taxing Officers of the respective Houses, and may from time to time prepare lists of the charges to be allowed upon the taxation of any such bills of costs, charges, and expenses in the respective Houses; and for the purpose of any such taxation the Taxing Officer may examine the parties and witnesses upon oath, and call for the production of any books or writings in the hands of any party to the taxation, and may demand and receive for any such taxation such fees as may from time to time be authorised by any order of the House of Commons or of the House of Lords, as the case may be, and award the costs of the taxation against either party, or in such proportion against each party as he thinks fit (10 & 11 Vict. c. 69, ss. 3-7; 12 & 13 Vict. c. 78, ss. 3-7).

Upon the application of any person upon whom a demand in respect of any such costs, charges, or expenses has been made, or of any parliamentary agent or solicitor making any such demand, the Taxing Officer, on receiving a true copy of the bill of costs, which has been duly sent or delivered to the party charged, must proceed to tax and settle the same; and if either party, having due notice, neglects to attend, he may proceed *ex parte*; and if, pending such taxation, any action is commenced to recover the costs, charges, or expenses, all proceedings in the action must be stayed until the amount of the bill has been certified by the Speaker, or by the Clerk of the Parliaments, or Clerk Assistant, as the case may be. But no such application, if made by the party charged with the bill, may be entertained by the Taxing Officer after a verdict has been obtained or writ of inquiry executed in any action for the recovery of the demand, or, except by special direction of the Speaker, or of the Clerk of Parliaments, or Clerk Assistant, as the case may be, after the expiration of six months after the delivery of the bill (*ibid.* s. 8).

The Taxing Officer, if required by either party, must report his taxation to the Speaker, or to the Clerk of the Parliaments, or Clerk Assistant, as the case may be, and within twenty-one days either party may deposit a memorial complaining of such report, and the Speaker or Clerk of the Parliaments or Clerk Assistant may require a further report, and, if necessary, direct the Taxing Officer to amend his report; and if no such memorial is deposited, or so soon as the matters complained of have been finally disposed of, the Speaker, or the Clerk of Parliaments or Clerk Assistant, may issue a certificate of the amount due, and such certificate is binding and conclusive on the parties, and in any action for the recovery of the amount so certified has the effect of a warrant of attorney to confess judgment; but if in any such action the defendant pleads that he is not liable to the payment of the costs, charges, or expenses, the certificate is only conclusive as to the amount thereof, and not as to the liability of the defendant (*ibid.* s. 9).



If any bill of costs, taxable by virtue of either of the Acts, comprises any costs, charges, or expenses incurred in respect of a private bill, but not taxable by virtue of the Act, the Taxing Officer of the House of Lords or of the House of Commons, as the case may be, may either tax and settle such costs, charges, and expenses himself, or request the Taxing Officer of the other House, or the proper officer of any other Court, to assist him in taxing and settling any part of such bill (12 & 13 Vict. c. 78, ss. 10–13).

[*Authorities*.—May's *Parliamentary Practice*; Clifford's *History of Private Bill Legislation*; Dodd and Wilberforce on *Private Bill Procedure*.]

**Private Bill Office.**—See PRIVATE BILL LEGISLATION.

**Private Chapels.**—See PROPRIETARY CHAPELS.

**Private Charity.**—See CHARITIES, vol. ii. at p. 468.

**Private Documents.**—See EVIDENCE, vol. v. at pp. 92, 95; PUBLIC RECORDS AND DOCUMENTS.

**Private Dwelling-House.**—A covenant not to use a house “for any trade or manufacture, or for any other purpose than a private residence,” is broken by using it as a boarding-house for scholars attending a neighbouring school kept by the owner of the house; for in such a case the covenantor is really using the house as a boarding-house, and not as a private residence in the ordinary acceptation of the term (*Hobson v. Tulloch*, [1898] 1 Ch. 424; see also *German v. Chapman*, 1877, 7 Ch. D. 271, and *Rolls v. Miller*, 1884, 27 Ch. D. 71). In such covenants the words “and not for any purpose of trade or business,” or similar words, are commonly added, and they in fact imply the user of the house as a private dwelling-house only, even if those words are absent (*Rolls v. Miller*, *ubi supra*); while the user of a house as a private residence precludes the carrying on of a business there (*Hobson v. Tulloch*, *ubi supra*). As to the various structural and sanitary requirements of dwelling-houses, see articles PUBLIC HEALTH; SEWER; WATER SUPPLY.

**Privateering**—Armed cruising of private ships commissioned by a belligerent State to carry on operations of war against the enemy. The vessel so armed and commissioned is called a *privateer*, and the commission is granted by *letters of marque*.

Privateers are distinguished from private vessels converted into ships of war by the belligerent, and manned by their proper naval officers. The former are fitted out by the owners at their own expense, and it was usual to allow them to keep, by way of remuneration, what they could take from the enemy, after giving the admiral his share. They had further to find security for good behaviour; and other means, such as liability to search by public vessels of the country whose flag they carried, were taken, to secure that they did not violate the laws of war (Lawrence, *Principles*, p. 417). It was usual for the Lords of the Admiralty to institute proceedings



in the Admiralty Court upon complaint of ill-conduct. Moreover, as a privateer is not invested with a public character, neutral ships of war are permitted to verify the lawfulness of the commission under which she sails (Hall, *Int. Law*, p. 546).

The commissioning of privateers, though once universally resorted to by belligerent States, has fallen practically into disuse. In the war of 1854, both Great Britain and France notified that they would carry on the hostilities at sea by their armed public ships exclusively, and at the Congress of Paris a declaration abolishing the practice was agreed to among the signatory States (see DECLARATION OF PARIS).

In future warfare, while the declaration remains in force, privateers cannot be lawfully commissioned by the signatories of that declaration against any of the States which are parties thereto. The only States which have thus far refused to be pledged to this abolition, are the United States, Spain, Mexico, Venezuela, and Bolivia. In the present war between the United States and Spain, however, both belligerents have decided not to employ privateers, though not bound by the declaration. (See under BELLIGERENT more fully as to the construction of the abolition clause in the Declaration of Paris.)

[*Authorities.*—Hall, *International Law*, Oxford, 1895; Lawrence, *The Principles of International Law*, vol. i. s. 223, London, 1895; Twiss, *Law of Nations in Time of War*, London, 1895.]

**Private Hearing.**—See CAMERA, IN.

**Private Improvements.**—See IMPROVEMENT OF LAND; SETTLED LAND ACTS.

## Private International Law.

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### 1. DEFINITION AND NATURE.

“Private International Law,” says Prof. Westlake, “is that department of national law which arises from the fact that there are in the world different territorial jurisdictions possessing different laws” (*Priv. Int. Law*, p. 1). See under CONFLICT OF LAWS the reasons which have been given by different authors for and against the term.



An extension of the meaning of Private International Law is given by Prof. Lainé, who defines it as "regulating . . . the relations which are or ought to be established between States from the point of view of the particular interests of their subjects, and with special reference to the conflict of their laws" (*Introduction au droit int. privé*, p. 17).

Prof. André Weiss, without thus far having given a definition of Private International Law (the last two branches and general introduction of his work have still to appear), embraces under that heading—(1) Nationality; (2) the rights of foreigners; (3) conflict of laws, forming a branch apart from the rights of foreigners; (4) conflicts of jurisdiction and procedure; and (5) the execution of foreign judgments. This system places in the domain of Private International Law matters which do not fall logically under the heading of conflict of laws, and yet are not a part of international law as the law governing the relations between STATES (*q.v.*).

Fœlix is generally credited with having originated the term. "International Law," he says, "is divided into public law and private law. Public international law regulates the relations between nation and nation; or, in other words, it treats of conflicts of public law. The *ensemble* of the rules, according to which conflicts between the private law of different nations is called Private International Law; in other words, private international law is composed of rules relative to the application of the civil or criminal law of any State in the territory of a foreign State" (*Droit int. privé*, p. 2). This author does not, as is seen, claim to invent the term, which he probably borrowed through a mistranslation from Germany, where the term *Internationales Privatrecht* was already in use when he published his book (1843) (see Schäffner, *Entwicklung des internationalen Privatrechtes*, Frankfort, 1841).

In the Scottish universities the German title of "International Private Law" has been adopted in the place of Private International Law.

On the whole, the divisions of Prof. Weiss seem to be the most convenient. As, however, we have treated Nationality and the position of foreigners under separate titles (ALIEN; ALIENAGE; BRITISH SUBJECT; NATIONALITY; etc.), the present article will deal with matters which may properly be comprised under conflict of laws.

## 2. HISTORICAL.

Private International Law, as it presents itself at the present day, is of modern derivation. It is even doubtful whether we need follow different authors back to the system of personality of the law which succeeded the break-up of the Roman Empire. With the development of territorial sovereignty, the place of birth ceased to determine the personal law, and the territorial law was applied to all persons resident within the area of its jurisdiction. Conflicts of local customs and laws necessarily occurred in countries where every province—nearly every town—was governed by a different charter or custom. Rules were doubtless followed in dealing with these conflicts, and though they arose between customs affecting persons owning the same allegiance, from them probably descend the contemporary rules applicable between laws affecting persons owning a different allegiance.

Thus the countries where conflicts of law were first studied as a branch of law seem to have been just such as Holland and Germany, composed of communities which, though governed under different laws, have been united by the force either of law or of sentiment into something like one State or Confederacy (Dicey, *Conflict of Laws*, p. 7). The maxims adopted in England



for their solution were derived from those which prevailed on the Continent, the earliest channel through which they filtered into our insular system being the ecclesiastical and admiralty Courts, "which professedly administered laws of more than insular extension" (Westlake, *Priv. Int. Law*, p. 8).

The whole branch of the law in question is estimated by Prof. Dicey to have come into existence in England within little more than a century. "Even now it is far more often tacitly assumed than expressly acknowledged as the foundation of judicial decisions" (*Conflict of Laws*, p. 24).

"Extra-territorial recognition of rights," to use an expression first employed by Prof. Holland (*Jurisprudence*, 8th ed., p. 370), has nevertheless now unquestionably become admitted as within the power of the English Courts, and it is in practice applied.

"I confess," said Lord Halsbury (*In re Missouri Steamship Co.*, 1889, 42 Ch. D. (C. A.) 321), "I have been somewhat surprised at the lengthy elaboration of principles which I should have thought by this time had been so far accepted as part of the English law, that it was not necessary to enter into so elaborate a consideration of them. That one country will under some circumstances enforce contracts made in another is a proposition I should have thought not requiring authority."

### 3. RULES OF, AND THEIR GENERAL APPLICATION.

Story sums up the general maxims which govern cases of conflict of laws as follows:—

1. The first and most general maxim or proposition is that every nation possesses an exclusive sovereignty and jurisdiction within its own territory.

As a natural consequence of the above—

2. No State or nation can, by its laws, directly affect or bind property out of its own territory, or bind persons not resident therein, whether they are natural-born subjects or others.

From these two maxims or propositions flows a third:—

3. That whatever force and obligation the laws of one country have in another, depends solely upon the laws and municipal regulations of the latter; that is to say, upon its own proper jurisprudence and polity, and upon its own express or tacit consent (*Conflict of Laws*, pp. 28–33).

As regards the third of these propositions, the Courts of England never in strictness enforce foreign laws; when they are said to do so, they enforce not foreign laws, but rights acquired under foreign laws (Dicey, *Conflict of Laws*, p. 10). Prof. Dicey puts this principle into the following form:—

Any right which has been duly acquired under the law of any civilised country is recognised, and in general enforced by the English Courts, and no right which has not been duly acquired is enforced or in general recognised by English Courts

(*Conflict of Laws*, p. 22).

The same writer reduces the rules among which selection may be made of the law under which the right has been acquired to five, viz.:—

1. *Lex personalis*, or "the law of the country to which a person belongs either—(a) by domicile (*lex domicilii*); or (b) by nationality (*lex ligentiae*);

2. *Lex actus*, or "the law of the country where a legal act takes place," of which the *lex loci contractus*, or the law of the place where a contract is made, is a subdivision;

3. *Lex loci delicti*, or "the law of the country where a wrong is committed";

4. *Lex loci solutionis*, or "the law of the country where a legal act (payment) is to be performed"; and



5. *Lex fori*, or "the law of the country to which the Court belongs in which an action is brought or other legal proceeding (*e.g.* administration in bankruptcy) takes place" (cp. Holland, *Jurisprudence*, 8th ed., p. 365).

Prof. Westlake further distinguishes between matters which are subject to a particular national jurisdiction and matters in which all the claims should be adjudicated upon together. The first are where the subject of the action, if a thing, is situate, if a contract, was made, if a delict, was committed, within the territory. To these apply the *forum situs* or *rei sitæ*, *contractus*, *delicti*, the two latter of which are classed together as the *forum speciale obligationis*. To the second applies the *forum concursus*; or that to which the defendant is personally subject, the *forum rei* (*Priv. Int. Law*, p. 5).

The English Courts in determining whether a case falls within the one or the other of these rules, enjoy a wider range of sources to which they may look for guidance than in ordinary domestic litigation. They must of course first ascertain whether it falls within the terms of any Act of Parliament. If it does not, the next inquiry is whether it is covered by any principle to which precedent has given the authority of law. If it fall neither within the terms of any Act of Parliament nor under any principle established by authority, the judge looks for guidance to foreign decisions, to the opinions of jurists, or to arguments drawn from general principles (Dicey, *Conflict of Laws*, p. 21).

"Whenever, as often happens," adds Prof. Dicey, "neither the Statute Book nor the Reports contain any authoritative direction for the decision of a particular case, or rather of a particular class of cases, an intelligent inquirer must recur to the judgments of foreign Courts, and especially of American tribunals, and to the doctrine of authors such as Story or Savigny, whose decisions have, in fact, moulded the decisions of English judges. Such reference is justified not by the fictitious authority of any common law of Europe, but by the consideration that English judges, when acting in a legislative capacity, rightly give weight to the opinion of eminent jurists, and are influenced by the wish to make the practice of our Courts correspond in a matter which concerns all civilised States, with the practice upheld by foreign tribunals"

(*Conflict of Laws*, p. 20).

#### 4. SPECIAL APPLICATION OF RULES.

(a) *Status and Capacity*.—The status of a person is his general legal capacity to acquire and exercise rights.

"There are certain rights and duties," says Austin, "with certain capacities and incapacities to take rights and incur duties by which persons as subjects of law are variously determined to certain classes. The rights, duties, capacities, or incapacities which determine a given person to any of these classes constitute a condition or status which the person occupies or with which the person is invested"

(*Jurisprudence*, 2nd ed., 1861, p. 70).

The chief varieties of status among natural persons may be referred to the following causes:—(1) sex; (2) minority; (3) "*patria potestas*" and "*manus*"; (4) coverture; (5) celibacy; (6) mental defect; (7) bodily defect; (8) rank, caste, and official position; (9) race and colour; (10) slavery; (11) profession; (12) civil death; (13) illegitimacy; (14) heresy; (15) foreign nationality; (16) hostile nationality. All the facts included in this list, which we borrow from Prof. Holland, have been held at one time or another to differentiate the legal positions of persons affected by them from that of persons of the normal type (*Jurisprudence*, 8th ed., p. 309).

To determine by which of different laws these varieties of status shall be governed, two criterions or systems still exist. The older one refers



status to the law of the domicile of the person involved, and the more modern one makes it dependent upon his nationality. The latter tends to prevail; instance the new German Civil Code, which is to come into operation in 1900 (see art. 7 of the Law of Introduction). "Whether our Courts," says Prof. Dicey, "have on this subject adopted any one invariable principle may be doubted; but they have of recent years gone so far as to hold that an individual's legal condition is in many cases liable to be affected by the law of his domicile, and perhaps they may be said to have adopted in a very general way the rule that status depends *prima facie* on domicile; but in practice this principle is subjected to limitations and exceptions, which often go near to invalidating it" (*Conflict of Laws*, p. 475).

Compare, nevertheless, dictum of Lord Watson in judgment, *Abd-ul-Messih v. Farra*, 1888, 13 App. Cas. 431-437:—

It is a settled rule of English law that civil status, with its attendant rights and disabilities, depends not upon nationality, but upon domicile alone.

Prof. Westlake sums up the position as follows:—

Whenever the operation of a personal law is admitted in England, the domicile of the person in question, and not his political nationality, is considered to determine such personal law. When the capacity of a person to act in any given way is questioned on the ground of his age, it is perhaps still uncertain whether the solution of the question will be referred in England to a personal law

(*Priv. Int. Law*, 3rd ed., p. 43).

It seems certain that the law of England will not recognise a foreign status unknown to English law (see *Hyde v. Hyde*, 1866, L. R. 1 P. & D. 130; *Blythe v. Ayers*, 96 Cal. 532; 31 Par. 915); but that where the transaction takes place wholly within the country where the person is domiciled, a status under the law of his domicile will be recognised in England (Dicey, *Conflict of Laws*, p. 477).

"If," says Prof. Dicey, "our English Court undertakes to determine the effect of acts done and rights exercised in a foreign country where a person is domiciled, the Court will recognise the effect of his status under the law of his domicile, without any reference to what would have been the status of such a person in England, or to what might or might not be the effect of his foreign status on transactions taking place in any other country than that of his domicile"

(*ibid.* p. 478).

But again, observes Mr. Nelson, quoting Prof. Dicey:—

The tendency (more particularly observable in matters of contract) to refer some matters which would seem in strictness dependent on status to the *lex loci actus* occasionally operates as a practical refusal to give effect to the general principle.

He is probably right when he says the subject is best studied in its particular applications (*Priv. Int. Law*, p. 66).

Prof. Dicey cites, among his examples, that English law will recognise the law of Spain, under which the property of a person who becomes a monk devolves on his heir (cp. *Santos v. Illidge*, 1860, L. J. C. P. 348; 8 C. B. (N. S.) Ex. Ch. 861).

(b) *Status of Foreign Corporations*.—The recognition of the right of such corporations to carry on business in England, and to sue and be sued in their corporate capacity before English Courts, is a matter of daily experience, and has now passed unquestioned for so long that it may be considered to be established (Dicey, p. 485; Westlake, p. 337). Their capacity is, of course, limited by English law, where the latter forbids any act not per-



mitted to British corporations. Thus they must conform to the restrictions of the Mortmain Act, 1888 (51 & 52 Vict. c. 42), on the acquisition of land in perpetuity.

As regards the personal liability of members of a foreign company, Sir Nathaniel Lindley observes—

That if a company is incorporated by a foreign Government, so that by the constitution of the company the members are rendered wholly irresponsible, or only to a limited extent responsible for the debts and engagements of the company, the liability of the members will be the same as in the country which created the corporation "

(Lindley, *Company Law*, 5th ed., p. 913. See *The General Steam Navigation Co. v. Gillon*, 1843, 11 Mee. & W. 877).

Conventions have been concluded between Great Britain and France and Belgium (1862) and Spain (1883) to insure recognition of British commercial companies in these countries similar to that which obtains in England for companies of foreign origin. As regards the Convention with France, see in *Law Quarterly Review*, Oct. 1897, Barclay, *British Companies in France*. See, for Italy, Declaration with Great Britain, dated Nov. 26, 1867 (*Lond. Gaz.* Dec. 10, 1867, 6763); for Austria, Decree as to Foreign Companies (*Lond. Gaz.* Jan. 16, 1866, 261); for Germany, Declaration contained in Parliamentary Paper, 1874 [C. 942]; and for Mexico, Rules for the Protection of Commercial Associations of Mixed Nationality (*Lond. Gaz.* April 25, 1854, 1294).

It is a question whether a foreign commercial company exercising "all its rights" under a convention with Great Britain is placed in the same position as a British limited company. The sense of the words "exercise all their rights" is not clear, but if they mean anything, it is that the foreign company is not required to go through the formalities of formation in England in order to be admitted to legal personality. A British limited company, under the Companies Act, 1862 (sec. 18), can hold land. Any other company falls within the provisions of the Mortmain Act, 1888. Must a foreign commercial company, entitled to "exercise all its rights" in England, obtain a licence to hold land under sec. 1 of the above Act? We believe there has been no decision or authoritative statement on this subject.

(c) *Form of Documents*.—

"The true theory of the subject," says Phillimore, "would seem to require that the form of the contract should be regulated by the law of the place of its fulfilment or execution. But as in practice it often happens that the place of fulfilment is far removed from the place of the origin of the contract,—as it may be difficult to know, and even impossible to follow, the forms prescribed by the law of the place of fulfilment in the place of origin,—the general usage of States, increasing in force ever since the sixteenth century, has almost universally adopted the rule which is expressed by the phrase *locus regit actum* "

(vol. iv. p. 454. Cp. Story, ss. 260, 261).

Among these States England may be included, as regards all acts of obligation or contract.

"No act of this kind in a foreign country," to quote Phillimore again, "is holden valid by the tribunals of either of these States (England and the United States) unless executed according to the formalities prescribed by the law of that foreign country. Indeed, the maxim is considered by these tribunals to apply not only to the external form, but to the internal substance of the act of obligation. And this may be the reason why the distinction between the application of the rule to the form and to the substance is not very clearly taken in Story's elaborate work "

(vol. iv. p. 466).



So much is this so, that the subject forms part in English text-books of the private international law of contracts generally (see *infra*).

As regards wills, the application of the maxim *locus regit actum* has been specially enacted by the statute known as Lord Kingsdown's Act, 1861 (24 & 25 Vict. c. 114), which provides (s. 1) that—

Every will and other testamentary instrument made out of the United Kingdom by a British subject (whatever may be the domicile of such person at the time of his or her death) shall, as regards personal estate, be held to be well executed, and shall be admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be made according to the forms required either by the law of the place where the same was made, or by the law of the place where such person was domiciled when the same was made, or by the laws then in force in that part of Her Majesty's dominions where he had his domicile of origin.

(d) *Contract*.—The law governing obligations arising out of contract is that of the country where the contract is made, the *lex loci contractus*; but in English law this also often means the law by which the parties who make a contract intend it to be governed (Dicey, *Conflict of Laws*, p. 74). These in fact generally coincide, but they do not necessarily do so (*ibid.*).

Thus where a contract, entered into in England between a Scottish distiller and a merchant in London, to be performed in Scotland, contained an arbitration clause for reference to two members of the London Corn Exchange or their umpire, it was held that the parties intended that their rights should be interpreted, as to the arbitration clause, according to the law of England, and not that of Scotland (*Hamlyn & Co. v. Talisker Distillery*, [1894] App. Cas. H. L. Sc. 202).

In *Lloyd v. Guibert*, 1865, L. J. 35, (N. S.) 74, Mr. Justice Willes observed that—

It is generally agreed that the law of the place where the contract is made is *prima facie* that which the parties intended, or ought to be presumed to have adopted, as the footing upon which they dealt, and that such law ought, therefore, to prevail in the absence of circumstances indicating a different intention, as, for instance, that the contract is to be entirely performed elsewhere, or that the subject-matter is immoveable property, situate in another country, and so forth.

In *Chamberlain v. Napier*, 1880, 15 Ch. D. 614, it was held that, notwithstanding the general rule that the construction of a contract regarding personal estate is to be determined by the *lex loci contractus*, yet, in accordance with the manifest intention of the parties, as evidenced by the form of the instrument, the marriage contract must (so far as the husband's property was concerned) be construed according to English law. In this case two trusts had been created, the one in Scottish and the other in English form. Hall, V.-C., concluded, from the fact that the two sets of trusts were not framed in the same way, that they were meant to be different.

Real or immovable property is in all respects governed by the law of the country of its situation (*lex situs*). This includes the forms of conveying it (Westlake, *Private International Law*, p. 189).

Money produced by sale or otherwise from immovables would, in their *situs*, be considered to represent the immovables, and be subject to the same rights. It must be considered to represent them, and be subject to the *lex situs* in every jurisdiction in which it may happen to become administrable (*ibid.*; *loc. cit.*).

As regards successions, see *infra*.

The *lex loci contractus* does not, of course, apply where an Act of Parliament has otherwise disposed, as in the case of the Foreign Marriage Act,



1892 (see *infra*); nor is a contract valid, though in accordance with the law of the place where it is made, if it is invalid by English law or contrary to any "stringent domestic policy" in England. Thus evidence by writing must be furnished where required by sec. 4 of the Statute of Frauds, though the *lex loci contractus* does not require it (*Leroux v. Brown*, 1852, 12 C. B. 801; see Westlake, *Private International Law*, p. 250; see also Dicey, *op. cit.* pp. 541-543).

As regards interpretation, the following rule was laid down by Lord Cranworth in *Di Sora v. Phillipps* (1863, 10 H. L. 633):—

Where a written contract is made in a foreign country, and in a foreign language, the Court, in order to interpret it, must first obtain a translation of the instrument; secondly, an explanation of the terms of art, if it contains any; thirdly, evidence of any foreign law applicable to the case; and fourthly, evidence of any peculiar rules of construction, if any such rules exist, by the foreign law. With this assistance, the Court must interpret the contract itself on ordinary principles of construction.

But, in fact, there seems to be no precise principle to follow as regards construction. As Prof. Westlake truly observes, it would be a bold undertaking to frame any concise rule for the selection of a law upon interpretation (p. 254).

See for negotiable instruments, *BILLS OF EXCHANGE*, vol. ii. p. 106).

(e) *Realty (Immovables)*.—

"No general rule," says Prof. Westlake, "can be laid down for the construction of contracts, wills, or other dispositions concerning immovables. A stringent rule of construction existing by the *lex situs* of the immovables concerned, will of course prevent any instrument from affecting the immovables except in accordance with it, but otherwise a reasonable regard must be had to all the circumstances, including the *locus contractus* or *actus*, and the national character or domicile of the parties, testator or other disponent"

(*op. cit.* p. 193).

This, however, may be said, that immovables are governed by the law of their situation irrespectively of the domicile of the testator or intestate, and that this applies both to the testamentary capacity of a testator and to the forms and solemnities requisite to give effect to his will (see *Coppin v. Coppin*, 1725, 2 P. Wms. 291; *Orrell v. Orrell*, 1871, L. R. 6 Ch. 302; *Boyse v. Colclough*, 1854, 24 L. J. Ch. 7).

English real estate descends according to English law, whatever may have been the personal law of the intestate (Westlake, *op. cit.* p. 192). The effect of marriage on rights over (see *Harrison v. Harrison*, L. R. 8 Ch. 342; and Dicey, *op. cit.* p. 519), and all questions concerning a restraint on the alienation or disposition of, such estate are also to be decided by English law (Westlake, *op. cit.* p. 191). See Dicey, *op. cit.* p. 524, as to certain immovables which in the United Kingdom form part of the personal estate, and pp. 65 and 72 for the distinction between realty and immovables.

(f) *Successions to Personal Estate (Movables)*.—

The universal doctrine now recognised by the common law, although formerly much contested, is that the succession to personal property is governed exclusively by the law of the actual domicile (*q.v.*) of the intestate at the time of his death

(Story, *Conflict of Laws*, ed. 1846, s. 481).

This law decides who are the persons entitled in distribution, and in what degree of preference, if any, they are so entitled (Phillimore, *International Law*, ed. 1861, iv. p. 634).

But whatever the domicile (or political nationality) of the deceased, his



personal property, wherever situated, cannot be lawfully possessed, or if recoverable in England cannot be sued for, without an English grant of probate and administration (Westlake, *op. cit.* p. 96). As regards the foreign persons to whom such grants should be made, Lord Penzance, in *In re Hill* (1870, L. R. 2 P. & M. 90), said :

I have before acted on the general principle that where the Court of the country of the domicile of the deceased makes a grant to a party, who then comes to this Court and satisfies it that by the proper authority of his own country he has been authorised to administer the estate of the deceased, I ought without further consideration to grant power to that person to administer the English assets.

Any will of movables which is valid according to the law of the testator's domicile at the time of his death is valid in England, and conversely any will of movables which is invalid according to the law of the testator's domicile at the time of his death on account of (a) the testamentary incapacity of the testator, or (b) the want of the formalities required by such law, or (c) its provisions being contrary to such law, is invalid (Dicey, *op. cit.* pp. 684 and 686).

This, however, is subject to the following exceptions under the Wills Act, 1861 (24 & 25 Vict. c. 114):—

Every will and other testamentary instrument made out of the United Kingdom by a British subject (whatever may be the domicile of such person at the time of making the same or at the time of his or her death) shall, as regards personal estate, be held to be well executed for the purpose of being admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be made according to the forms required either by the law of the place where the same was made, or by the laws then in force in that part of Her Majesty's dominions where he had his domicile of origin

(s. 1); and

Every will and other testamentary instrument made within the United Kingdom by any British subject (whatever may be the domicile of such person at the time of making the same or at the time of his or her death) shall, as regards personal estate, be held to be well executed, and shall be admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be executed according to the forms required by the laws for the time being in force in that part of the United Kingdom where the same is made.

(g) *Husband and Wife*.—For Marriage and Divorce, see FOREIGN MARRIAGE; FOREIGN DIVORCE.

The authority of a husband as regards the person of his wife while in England is not affected by the nationality or the domicile of the parties, but is governed wholly by the law of England (Dicey, *op. cit.* p. 490).

The effect of marriage on English land, in the absence of express contract, is governed by the law of England without reference either to the domicile of the parties or to the place of celebration (*loci celebrationis*) of the marriage (Westlake, *op. cit.* pp. 66 and 71). See *Realty, supra*.

Where there is no marriage contract or settlement, the mutual rights of husband and wife to each other's movables, whether possessed at the time of the marriage or acquired afterwards, are governed by the law of the husband's domicile at the time of the marriage, without reference to the law of the country where the marriage is celebrated or where the wife is domiciled before marriage (Dicey, *op. cit.* pp. 648, 649).

The domicile of the husband at the date of the marriage, with the possible exception of another domicile which may have been acquired after the marriage in pursuance of an agreement to that effect made before it, is called the matrimonial domicile

(Westlake, *op. cit.* p. 68).



A marriage contract or settlement, in the absence of reason to the contrary, is construed according to the law of the matrimonial domicile (see Dicey, *op. cit.* 653; Phillimore, *op. cit.* p. 306; and *Duncan v. Cannon*, 1854, 18 Beav. 128; 23 L. J. Ch. 268; *Byam v. Byam*, 1854, 19 Beav. 58; *Colliss v. Hector*, 1875, L. R. 19 Eq. 334; *Anstruther v. Adair*, 1834, 2 Myl. & K. 513).

On the other hand, it is admitted in principle that the succession to either consort on death must be separated from the effect of marriage on property, and be regulated by the law of the last domicile of the deceased (Westlake, *op. cit.* p. 73).

As regards the formal requisites of a marriage settlement or contract, they are *generally* governed by the law of the place where it is made (see *supra*, *Form of Documents*, and Westlake, p. 70). But the English Courts do not enforce the *lex loci actus* rigorously. Thus in *Van Grutten v. Digby*, 1862, 31 Beav. 561; L. J. N. S. 32, p. 179, where the deed in English form was executed in France, the judge (Romilly, M. R.) said:

I hold it to be the law of this country that if a foreigner and Englishwoman make an express contract previous to marriage, and if, on the faith of that contract, the marriage afterwards takes place, and if the contract relates to the regulation of property within the jurisdiction and subject to the laws of this country, then and in that case this Court will administer the law on the subject as if the whole matter were to be regulated by English law.

(h) *Guardianship*.—A foreign guardian has strictly speaking no authority over his ward in England (*Johnstone v. Beattie*, 1843, 10 Cl. & Fin. 42; *Dawson v. Jay*, 1854, 3 De G., M. & G. 764; cp. *Ewing and Others v. Orr-Ewing*, 1883, 9 App. Cas. 34 H. L. (E.); *Ewing v. Orr-Ewing*, 1885, 10 App. Cas. 454 H. L. (Sc.)), except such as could be exercised by an English guardian (*Johnstone v. Beattie*); but the Court will not, from any supposed benefit to infant subjects of a foreign country who have been sent to the United Kingdom for the purposes of education, interfere with the discretion of the guardian who has been appointed by a foreign Court of competent jurisdiction, when he wishes to remove them from England in order to complete their education in their own country. But the Court refused to discharge an order by which guardians had been appointed over the children in this country; and merely reserved to the foreign guardian the exclusive custody of the children to which he was entitled by the order of the Court of his own country (*Nugent v. Vetsera*, 2 Eq. 704).

A foreign guardian, therefore, if he wishes to exercise his powers in England, whether over his ward's person or property, should get himself appointed guardian by the English Courts. See INFANTS (*Foreign Guardian*), vol. vi. p. 419.

(i) *Lunacy*.—No English jurisdiction in lunacy can be applied to any person unless under the authority of the English Court, which has an absolute discretion to grant or refuse any application made to it. See CURATOR BONIS; LUNACY; *In re Garnier*, 1872, L. R. 13 Eq. 532; and *In re A. M. Knight*, [1898] 1 Ch. 257.

In a case under the Lunacy Regulation Act, 1853 (now repealed and superseded by the Lunacy Act, 1890), on it being proposed to appoint as committee a person resident out of the jurisdiction, the Master in Lunacy reported that, as the proposed committee was resident out of the jurisdiction, he could not approve of him, and the Court, though satisfied of the expediency of appointing him, declined to do so until the Master had certified that the proposed committee was a person whom, if resident within the jurisdiction, he would have approved (*In re Bruère*, 1881, 17 Ch. D. 775).



It seems doubtful, observes Mr. Nelson, whether "a foreign committee of the person has, in that character only, any authority in respect of a lunatic's person here (*Sylva v. Da Costa*, 1803, 8 Ves. 316; *In re Houstoun*, 1826, 1 Russ. 312). If it is rendered necessary by circumstances, the proper proceedings should be taken here; and, at any rate when the property here is small and movable, the Court, on the person being found lunatic, will order that he be delivered into the custody of a properly appointed foreign committee or guardian" (*In re Sottomaior*, 1874, L. R. 9 Ch. 677; *Johnstone v. Beattie*, *supra*; *Ex parte Child*, 15 C. B. 238).

(j) *Copyright*.—See BERNE CONVENTION; COPYRIGHT (*International Copyright*).

(k) *Ships*.—A British ship as an article of purchase and sale, and so long as private law applies to her, is a movable, though on the high seas and as a subject of public law she is assimilated for most purposes to British territory. The Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), provides that—

Where, in any matter relating to a ship or to a person belonging to a ship, there appears to be a conflict of laws, then if there is (in Part II. of the Act) any provision on the subject, which is hereby expressly made to extend to that ship, the case shall be governed by that provision; but if there is no such provision, the case is to be governed by the law of the port at which the ship is registered (s. 265).

It has also been decided that where the contract of affreightment does not provide otherwise, as between the parties to a contract, in respect of sea-damage and its incidents, the law of the country to which the ship belongs must be taken to be the law to which they have submitted themselves. In the important case of *Lloyd v. Guibert*, the plaintiff, a British subject, chartered a French ship belonging to French owners, at a Danish West India port, for a voyage from St. Marc in Hayti, to Havre, London, or Liverpool, at charterer's option. The charter-party was entered into by the master in pursuance of his general authority as master. The plaintiff shipped a cargo at St. Marc for Liverpool, with which the vessel sailed. On her voyage she sustained sea-damage and put into Fayal, a Portuguese port, for repair. There the master properly borrowed money on bottomry of ship, freight, and cargo, and repaired the ship, and she completed her voyage to Liverpool. The bondholder proceeded in the Court of Admiralty against the ship, freight, and cargo. The ship and freight were insufficient to satisfy the bond; and the deficiency with costs fell on the plaintiff as owner of the cargo, for which he sought indemnity against the defendants, the French ship-owners. The defendants gave up the ship and freight to the shipper, so as that by the alleged law of France the abandonment absolved them from all further liability on the contract of the master. It was held that the parties must be taken to have submitted themselves, when making the charter-party, to the French law as the law of the ship, and therefore that, assuming the law of France to be as alleged, the plaintiff's claim was absolutely barred (1865, L. R. 1 Q. B. 115).

The law of the flag is sometimes referred to in text-books and decisions as meaning the law of the country whose flag a ship carries. When the flag carried by a ship is that of a State including more than one country, the law of the flag means (*semble*), says Prof. Dicey, the law of the country where the ship is registered (*Conflict of Laws*, p. 589). See Westlake, *Priv. Int. Law*, p. 262.

Nevertheless, the country to which a ship, in fact, belongs is ultimately fixed by the nationality of her owner, and circumstances may exist under which a ship, for some purposes at any rate, belongs to a country of which



she does not carry the flag (see *Chartered Bank of India v. Netherlands Co.*, 1883, 10 Q. B. D. [C. A.] 521). See EXTERRITORIALITY; FOREIGN SHIP.

(l) *Collisions*.—See COLLISIONS AT SEA (*Law Applicable to Collisions*), vol. iii. p. 91.

(m) *Bankruptcy*.—See BANKRUPTCY, vol. i. pp. 492, 516. The recognition of a foreign bankruptcy is in England dependent upon its having been declared in the country of the bankrupt's domicile. Thus the persons (trustees, syndics, or others) who under the law of the bankrupt's domicile are appointed to administer his estate, are entitled to any personal property he may have in England. But no assignment of a bankrupt's property under the bankruptcy law of a foreign country, unless the bankruptcy takes place, as does a Scotch or Irish bankruptcy, under an Act of the Imperial Parliament, operates as an assignment of the bankrupt's immovables, *e.g.* lands or houses in England, or, indeed, has any effect upon the title to them (Dicey, *op. cit.* p. 443).

Where the bankruptcy has been declared in a foreign country in which the bankrupt is not domiciled, *semble*, it does not affect the personal property of the bankrupt in England. Thus a firm having its head offices in Paris, and a branch establishment in England, was declared bankrupt in Paris under the law of France, and a syndic was appointed to administer the estate. Subsequently a bankruptcy petition was presented against them in England, and an order was made appointing an interim receiver. The syndic applied to the Court to discharge this order, and to stay all further proceedings under the petition. There was no evidence as to the domicile of the members of the firm, but two of them resided in England, where the firm had large assets. The registrar refused the application. On appeal it was held that there being assets within the jurisdiction, the receiving order was rightly made, and that the fact that a prior bankruptcy had been commenced in a foreign country, not shown to be the country of and domicile of the debtors, was no ground for staying the proceedings in this country (*In re Artola Hermanos, Ex parte Chale*, 1890, 24 Q. B. D. 640).

In general, however, the administration in bankruptcy of the property of a bankrupt which has passed to the trustee is governed by the law of the country where the bankruptcy proceedings take place, on the principle that all matters of procedure are governed by the *lex fori* (see *infra*; Dicey, *op. cit.* p. 671).

As regards the effect of a foreign bankruptcy on the obligations of the bankrupt, it has been held that a party to a contract made and to be performed in England is not discharged from liability under such contract by a discharge in bankruptcy or liquidation under the law of a foreign country, though one in which he is domiciled (*Gibbs & Sons v. La Société Industrielle et Commerciale des Métaux*, 1890, 25 Q. B. D. 399).

(n) *Jurisdiction*, see *supra*, *Rules of, and their General Application*. As regards ambassadors and diplomatic agents, see DIPLOMATIC AGENTS; and as to position of sovereign, see EXTERRITORIALITY.

(o) *Procedure, Evidence, Foreign Judgments*.—Procedure is entirely governed by the *lex fori* or law of the country to which the Court in which the proceedings are taken belongs. For evidence, see COMMISSION, EVIDENCE ON, vol. iii. p. 125 (subs. *In Foreign Countries*).

The manner of proving the facts as belonging to procedure depends on the *lex fori* (*The Gaetano*, 1882, 7 P. D. 137, 144; *Bain v. Whitehaven Rwy. Co.*, 1850, 3 H. L. 1, 19; *Yates v. Thomson*, 1835, 3 Cl. & Fin. 544; *Brown v. Thornton*, 1837, 6 L. J. (N. S.) K. B. 82). See FOREIGN JUDGMENTS.



(p) *Limitation of Actions*.—See Dicey, *op. cit.* pp. 518, 522, as to difference from prescription.

The two principal rules as to limitation are laid down by Prof. Westlake as follows:—

(1) An obligation cannot be enforced in England after it has been barred by the English Statute of Limitations, notwithstanding that it has not been barred according to its proper law; and

(2) An action can be brought in England on a contract or tort so long as an obligation resulting from such contract or tort would not have been barred by the English Statute of Limitations, notwithstanding that the obligation, which, in fact, resulted from it, has been barred according to its proper law, *lex loci contractus* or *solutionis* or *lex loci delicti commissi* (*op. cit.* ss. 238, 239).

Prof. Dicey classes limitation of actions or other proceedings under procedure as governed by the *lex fori*.

(q) *Torts*.—In *The Chartered Bank of India v. The Netherlands India Steam Navigation Co.*, 1883, 10 Q. B. D. 521, 536, 537, Brett, L.J., held that—

For any tort committed in a foreign country within its own exclusive jurisdiction an action for tort cannot be maintained in this country, unless the cause of action would be a cause of action in that country, and also would be a cause of action in this country. Both must combine if the tort alleged was committed within the exclusive jurisdiction of a foreign country.

Thus not only can an action not be maintained in this country upon a wrong committed abroad which is not actionable by the law of England (*The Halley*, 1868, L. R. 2 P. C. 193; and see *Hart v. Gumpach*, 1873, L. R. 4 P. C. 439), but also no action can be maintained here if the alleged cause of action was justifiable by the law of the place where it was done (*Phillips v. Eyre*, 1869, L. R. 4 Q. B. 225, 239, and 1870, L. R. 6 Q. B. 1, 29; *Dobree v. Napier*, 1836, 5 L. J. (N. S.) C. P. 273; *The M. Moxham*, 1876, 1 P. D. 107). See Nelson, *Priv. Int. Law*, p. 290.

If the remedy provided by the *lex loci* is purely penal and penal only, it would seem that no action can be maintained in this country, although the act complained of would be tortious if done here (*Phillips v. Eyre*; *Chartered Bank of India v. Netherlands Co.*). See Nelson, *Priv. Int. Law*, p. 291.

(r) *Criminal Offences*.—

The common law considers crimes as altogether local, and cognisable and punishable exclusively in the country where they are committed. No other nation, therefore, has any right to punish them; or is under any obligation to take notice of, or to enforce any judgment rendered in such cases by the tribunals having authority to hold jurisdiction within the territory where they are committed

(Story, *Conflict of Laws*, p. 1013).

Crimes committed on a British ship on the high seas are deemed to have taken place on British territory (*R. v. Lopes*, 1858, 27 L. J. M. C. 48; *R. v. Lesly*, 1860, 29 L. J. M. C. 97; *R. v. Peel*, 1862, 32 L. J. M. C. 65; *R. v. Armstrong*, 1875, 13 Cox C. C. 185).

As regards offences committed in British TERRITORIAL WATERS (*q.v.*), see the Territorial Waters Jurisdiction Act, 1878 (41 & 42 Vict. c. 73); see also FRANCONIA CASE. Offences committed on board a British ship within the territorial waters of a foreign State seem to be subject to English law, reasoning *à fortiori* from the decision in *R. v. Anderson* (L. R. 1 C. C. 161). In this case it was held that the Admiralty jurisdiction of England extends over British vessels, not only when they are sailing on the high seas, but also when they are in the rivers of a foreign territory at a place below



bridges where the tide ebbs and flows and where great ships go, and that all seamen, whatever their nationality, serving on board such British vessels, are amenable to the provisions of British law. The facts were that an American citizen serving on board a British ship caused the death of another American citizen serving on board the same ship in circumstances amounting to manslaughter, the ship at the time being in the river Garonne, within French territory, at a place below bridges where the tide ebbed and flowed and great ships went. It was held that the prisoner was rightly tried and convicted in the Central Criminal Court.

There are statutory exceptions to the above-mentioned territoriality of the law of England, as in the case of murder or manslaughter committed by a British subject "on land out of the United Kingdom, whether within the Queen's dominions or without, and whether the person killed were a subject of Her Majesty or not" (24 & 25 Vict. c. 100, s. 9), and in the case of bigamy committed by a British subject by a second marriage entered into in "England or Ireland or elsewhere" (24 & 25 Vict. c. 100, s. 57).

It seems also that the offence of procuring money by false pretences may be committed by posting a letter from England addressed to a place out of England (see dictum of Coleridge, C.J., in *R. v. Holmes*, 1884, 12 Q. B. D. 23).

#### 5. PROOF OF FOREIGN LAW.—See FOREIGN LAW.

#### 6. PROJECTS TO ASSIMILATE PRIVATE INTERNATIONAL LAW.

Several attempts have been made to bring about the adoption by different Governments of homogeneous rules in relation to those matters which give rise to conflicts of private law. Chief among these is an official conference which was held in September 1893, at the Hague, at the instance of the Dutch Government. A second similar conference was held in June–July 1894, at which the following Governments were represented:—Austria-Hungary, Belgium, Germany, Denmark, France, Holland, Italy, Luxembourg, Portugal, Roumania, Russia, Spain, Sweden and Norway, and Switzerland.

The subjects of marriage, separation, divorce, guardianship, civil procedure, bankruptcy, successions, and wills were considered and a model code was adopted thereon, but no further progress is known as yet to have been made; still, we may express the hope with Prof. Westlake "that the time is approaching when uniformity in private international jurisprudence will be attainable by means of conventions, carried out by legislation wherever necessary, and that neither the Parliament nor the Government of this country will hesitate to co-operate towards so desirable an end" (*op. cit.* p. 47).

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**Private Letters.**—Copyright is commonly understood to signify the exclusive right of multiplying copies of a work, and is in this sense the creature of statute, and commences only with publication. But it may also be used to denote the author's right to unpublished matter; and on this right, which is based upon the common law, the jurisdiction to restrain the publication of private letters is founded (*Jeffreys v. Boosey*, 1854, 4 H. L. 815, 867, 893, 919, 962; *Gee v. Pritchard*, 1818, 2 Swans. 402, 413; 19 R. R. 87). The right is in the writer and not in the receiver. The leading case is *Gee v. Pritchard*, in which Lord Eldon supported the doctrine laid down by Lord Hardwicke in *Pope v. Curl*, 1741, 2 Atk. 342. "Where a man writes a letter it is not in the nature of a gift to the receiver; it is only a special property in the receiver. Possibly the property of the paper may belong to him, but this does not give a licence to any person whatsoever to publish it to the world, for at most the receiver has only a joint property with the writer." This view has been approved in the recent case of *Labouchere v. Hess*, 1898, 77 L. T. 559. The statement of Plumer, V.C., in *Perceval v. Phipps* (1813, 2 Ves. & Bea. 19; 13 R. R. 1), that the Court would not interfere to restrain the publication of commercial or friendly letters, except under special circumstances, on the ground that private letters, as a rule, had not the character of literary work, has been frequently cited in argument, but has not been supported by subsequent decisions.

The Court accordingly, without proceeding so far as to decree the restoration of letters (*Gee v. Pritchard*, *supra*), will restrain any person in the possession of letters from publishing them against the will of the writer, except under special circumstances (*Labouchere v. Hess*, *supra*). What would constitute such special circumstances it is difficult exactly to determine, but publication will not be restrained when necessary for the purposes of justice (*Hopkinson v. Lord Burghley*, 1867, L. R. 2 Ch. 447), or for the vindication of the receiver's character (*Labouchere v. Hess*; *Lytton v. Devey*, 1884, 54 L. J. Ch. 93; *Folsom v. Marsh*, 1841, 2 Story (Amer.) 100), or when the acts of the parties themselves may supply reasons (*Gee v. Pritchard*; *Perceval v. Phipps*; *Labouchere v. Hess*), or where the letters have been written on behalf of some other, for it has been held that a solicitor who



wrote a letter to a shareholder apparently on behalf of a company has no such property in it as to prevent its publication, although he swears it was written in a private capacity (*Howard v. Gunn*, 1863, 32 Beav. 466).

[*Authorities*.—Copinger on *Copyright*, 3rd ed., 1893; Story on *Equity Jurisprudence*, 13th ed., by Bigelow.]

**Private Road**—A road not dedicated to the use of the public as a highway. Occupation roads made on an estate for the accommodation of the owners and occupiers on it are not dedicated to the public use, though where the proprietor covenanted that the owners and occupiers should have the full use and enjoyment of the roads as if they were public roads, it was held that a gas company could, on their requisition, break the soil of the road to lay down gas mains without the proprietor's consent (*Selby v. Crystal Palace Gas Co.*, 1862, 30 Beav. 606). And the mere user, though immemorial, of a private road for certain purposes, *e.g.* agricultural purposes, or for carrying materials to enlarge or rebuild farmhouses and cottages, does not establish a right-of-way for all purposes when the condition of the property has been altered, *e.g.* for carting materials required for building a number of new houses on the land (*Wimbledon and Putney Commons Conservators v. Dixon*, 1875, 1 Ch. D. 362).

The presumption that the soil of a road *usque ad medium filum* belongs to the owner of the adjoining lands applies in the case of a private road as well as that of a public one; but it is necessary that there should be no evidence of user under a claim of ownership, as distinguished from user *quà* road (*Holmes v. Bellingham*, 1859, 7 C. B. N. S. 329). Apart from some special agreement, the grantee of a private road is not under any obligation to repair it (*Duncan v. Louch*, 1845, 14 L. J. Q. B. 185); and no indictment will lie for the non-repair of such a road (*R. v. Richards*, 1800, 8 T. R. 634; 5 R. R. 489), nor can the liability be imposed on the parish (*R. v. Cottingham*, 1794, 6 T. R. 20; and see sec. 23 of the Highway Act, 1835, 5 & 6 Will. IV. c. 50). The owner of a private road is not bound to fence excavations, or otherwise protect the public from danger in using it (*Murley v. Grove*, 1882, 46 J. P. 360); and a surveyor is, by sec. 57 of the Highway Act, 1835, liable to a penalty if he digs material for a highway in an occupation road. But the local authority may call on the owners or occupiers of private streets to pave, sewer, level, metal, etc., them, and light them properly, and if they do not do so, may execute the works and recover the cost (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 150; see STREET). And a private road is a "street" within secs. 16 and 54 of the Public Health Act, 1875 (*Hill v. Wallasey Local Board*, [1894] 1 Ch. 133). Secs. 49 and 50 of the Railways Clauses Act, 1845 (8 Vict. c. 20), require the descent or ascent in a private carriage road passing under a railway, or a bridge carrying such a road over a railway, to be not more than 1 in 16 feet, unless a special Act otherwise provides (see RAILWAY). The rights of persons using a private way are not affected by its subsequent dedication to the public (*Duncan v. Louch*, *ubi supra*; *Brownlow v. Tomlinson*, 1840, 1 Man. & G. 486; and see *Wells v. London, Tilbury, and Southend Rwy. Co.*, 1877, 5 Ch. D. 126). A valuer under the Inclosure Act, 1845 (8 & 9 Vict. c. 118), is (s. 68) to set such private or occupation roads and ways through the lands to be enclosed as he thinks fit; the expenses, unless he direct otherwise, being paid like the other expenses of the inclosure.

The making of a private road is an authorised improvement under the Settled Land Act, 1882 (45 & 46 Vict. c. 38); see s. 25 (8). As to the



dedication of a road to the public and its adoption, see HIGHWAYS; and as to the acquisition of a private right-of-way by prescription, see PRESCRIPTION; EASEMENT.

[*Authorities*.—Glen on *Highways*, 2nd ed.; Pratt on *Highways*, 14th ed.]

**Privileged Copyholds.**—See COPYHOLD, vol. iii. at p. 388.

**Privileged Debts.**—See BANKRUPTCY, vol. i. at p. 517.

**Privilège (in French Law)**, a word met with in cases involving French law, the equivalent of preference as to the ranking of claims against an estate.

## Privilege; Privileged Communication.

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As to documents and communications privileged from disclosure either on discovery or at the trial of the action, see DISCOVERY, vol. iv. p. 277; DOCUMENTS, DISCOVERY OF, *ibid.* p. 331; EVIDENCE, vol. v. p. 97.

### I. PRIVILEGED OCCASIONS.

There are occasions on which it is right that one man should speak plainly about another, and state fully and freely what he honestly believes to be the truth as to his character or means. Such occasions are deemed in law to be *privileged*; and it is a defence to an action of libel or slander that the words were published on a privileged occasion. In some cases the privilege is *absolute*, and the plaintiff cannot succeed, however maliciously the words were uttered (see ABSOLUTE PRIVILEGE, vol. i. p. 38). But the number of such occasions is small, and the judges are not disposed to increase it. In a far larger number of cases the privilege is only *qualified*; that is to say, the privilege affords the defendant a *prima facie* defence, but the interests of society do not require that he should be freed from all liability. Hence the plaintiff may still recover, if he can satisfy the jury that the defendant on the privileged occasion did not act in good faith, but published the words through some improper motive. This improper motive is called "malice" (*Clark v. Molyneux*, 1877, 3 Q. B. D. at pp. 246, 247).



Whether a particular occasion is or is not privileged is a question of law for the judge as soon as the facts are ascertained or admitted; and it is for the defendant to satisfy the judge that the occasion is privileged. Whether the defendant on that occasion was actuated or not by malice, is a question of fact for the jury, if there be one; and it is for the plaintiff to prove malice, not for the defendant to establish his *bona fides* (*Jenoure v. Delmege*, [1891] App. Cas. 73).

Occasions of qualified privilege may be grouped under two heads:—

Privilege arising from Duty and Interest.  
Privileged Reports.

## II. PRIVILEGE ARISING FROM DUTY AND INTEREST.

The fundamental rule or canon by which such privileged occasions are to be ascertained is thus laid down by Lord Campbell, C.J., in *Harrison v. Bush*, 1855, 5 El. & Bl. at pp. 348, 349:—

“A communication made *bonâ fide* upon any subject-matter, in which the party communicating has an *interest*, or in reference to which he has a *duty*, is privileged, if made to a person having a corresponding *interest* or *duty*. And the word ‘duty’ cannot be confined to legal duties, which may be enforced by indictment, action, or *mandamus*, but must include moral and social duties of imperfect obligation.”

Both parties, then, must have either an interest in the subject-matter of the communication, or some duty to discharge in connection with it. The law does not protect idle gossip or officious interference in the affairs of other people. It must be the defendant’s duty, or it must be to his interest, to speak or write as he does; and moreover, the person to whom he speaks or writes must have either some duty to perform in the matter, or some legitimate interest in the subject. The duty, as Lord Campbell says, need not be one which would be enforced in a Court of law; a social or moral duty will be sufficient. So, too, the interest need not necessarily be pecuniary. On the other hand, mere curiosity is not sufficient. It must be an interest which the law recognises and approves.

Let us apply this rule to special cases:—

(i.) *Answers to Confidential Inquiries*.—All answers to confidential inquiries are privileged. “If a person who is thinking of dealing with another in any matter of business asks a question about his character from some one who has means of knowledge, it is for the interests of society that the question should be answered; and the answer is a privileged communication” (per Brett, L.J., in *Waller v. Loch*, 1881, 7 Q. B. D. at p. 622). The commonest instance of this is the “character” of a servant. If a lady is asked as to the capabilities and character of a former servant by any one who has the right to ask the question, it is the lady’s duty to state fully and frankly her honest opinion of the former servant, whether it tell in her favour or not. The same rule applies whenever a confidential inquiry is made—say, as to the solvency of a tradesman, or as to the competency and skill of a professional man. If the person inquiring has a legitimate interest in obtaining the information, it is the duty of those to whom he applies to give him a direct and honest answer to his question. There is, then, that necessary concurrence of duty and interest which creates a privilege. There must be some good reason for the question; the reply must be given seriously and honestly; it must be a relevant answer to the question, and not branch out into immaterial matters. Subject to these limitations, “every one owes it as a duty to his fellow-men to state what



he knows about a person when inquiry is made" (per Grove, J., in *Robshaw v. Smith*, 1878, 38 L. T. at p. 424).

(ii.) *Communications volunteered*.—There is but little difficulty when the communication complained of as defamatory is made in answer to a previous inquiry by a person interested. But there are cases in which it becomes a man's duty to go of his own accord to his neighbour, or even to a stranger, and give him certain information unasked. As a rule, no doubt, his safer course would be to wait till he is applied to; but life or property may be in imminent and obvious peril, or there may be other circumstances which make it clearly the duty of a good citizen to go at once to the person most concerned and tell him of the danger, without waiting for him to come and inquire. It may well be that that person has no suspicions, and never would inquire into the matter, unless warned. Yet it is not easy to lay down any general rule, defining the cases in which it is one's duty to volunteer information, at the risk of being deemed officious and meddlesome.

*Confidential Relationship*.—It is A.'s duty to volunteer such information to B., whenever a confidential relationship exists between A. and B.—whenever B. reposes trust and confidence in A., and could justly blame A., if he remained silent. Such a confidential relationship exists between husband and wife, father and son, brother and sister, guardian and ward, master and servant, principal and agent, solicitor and client, partners, or even intimate friends. Thus it is clearly the duty of B.'s steward, bailiff, foreman, or housekeeper, to whom he has intrusted the management of his lands, business, or house, to inform him if they know of anything wrong, and not to wait till his own suspicions are aroused, and he begins to make inquiries. So B.'s family solicitor may voluntarily write and inform B. of anything which he thinks it is to B.'s advantage to know. But it would be dangerous for another solicitor, whom B. had never employed, to volunteer the same information; for till B. retains him or seeks to retain him in the matter, there is no confidential relation existing between them (*Browne v. Dunn* (H. L.), 1893, 6 R. 67). So a father, guardian, or an intimate friend may warn a young man against associating with a particular individual; or may warn a young lady not to marry a particular suitor; though in the same circumstances it might not be the duty of a mere stranger to give such a warning (*Todd v. Hawkins*, 1837, 8 Car. & P. 88). So, if the defendant is in the army or in a Government office, it would be his duty to inform his official superiors of any serious misconduct on the part of his subordinates; but not, as a rule, to report on the conduct of his superiors or those of equal rank or standing with himself (*Stace v. Griffith*, 1869, L. R. 2 P. C. 420).

*Where there is no Confidential Relationship*.—The privilege is not confined to cases in which the parties stand in a confidential relationship to each other (*Stuart v. Bell*, [1891] 2 Q. B. 341). The rule of law is laid down by Blackburn, J., in much wider terms: "Where a person is so situated that it becomes right in the interests of society that he should tell to a third person certain facts, then if he *bonâ fide* and without malice does tell them, it is a privileged communication" (*Davies v. Snead*, 1870, L. R. 5 Q. B. at p. 611). But it is often difficult to say in a particular case whether it has or has not "become right" for the defendant to take action. This is a question rather of morality than of law; and the answer must depend on the facts of each particular case. Clearly, a man ought not to stand by and do nothing, when human life is in obvious danger, or when he has really strong grounds for suspecting that a crime is about to be committed. But in other cases our judges have frequently differed in opinion.



If A. learns that one of his tradesmen is about to supply goods on credit to a man whom A. reasonably believes to be practically insolvent, ought A. to warn him not to do so? Is it right, in the interests of society, that A. should tell the tradesman what he knows, or must he stand by and see him lose his money? In the reign of Queen Elizabeth, and again in the days of George III., it was held that no action would lie for such a caution, if it were given as "good counsel," and not out of malice against the intending purchaser (*Vanspike v. Cleyson*, 1597, Cro. (1) 541; *Herver v. Dawson*, 1765, Bull. N. P. 8). But in 1838 Lord Abinger, C.B., held that such a communication should not be volunteered; the defendant must wait till the tradesman applies to him for advice (*King v. Watts*, 8 Car. & P. at p. 615). And in *Bennett v. Deacon*, 1846, 2 C. B. 628, the Court of Common Pleas was equally divided on this question. Our present judges incline to follow the judgments of Tindal, C.J., and Erle, J., rather than those of Coltman and Cresswell, JJ., in this case, and would probably hold that such a caution was *prima facie* privileged. In *Coxhead v. Richards*, 1846, 2 C. B. 569, the same Court was equally divided on a very similar question, whether a disinterested third person may inform the owner of a ship that his captain had been guilty of gross misconduct at sea. Here, again, the view taken by Tindal, C.J., and Erle, J., would probably prevail in the present day. There has been quite recently a similar difference of opinion among our judges in the case of *Stuart v. Bell*, [1891] 2 Q. B. 341.

(iii.) *Publications made to protect the Defendant's own Interests*.—Whenever the defendant has an interest in the subject-matter of the communication, and the person to whom the communication is made has some duty to perform in the matter, the occasion is privileged. For instance, if any man is charged with misconduct, he is entitled to defend himself. If A.'s servant injures B.'s property, B. is entitled to complain to A., and both the complaint and any answer to the complaint are privileged. So if C. has been treated with incivility by a guard or a porter, C. may report the matter to the railway company; if his letters are not delivered regularly, he may complain to the Postmaster-General. In short, all communications made reasonably in self-defence, to protect the defendant's private interests, or to answer some attack made by the plaintiff, are privileged (*Blackham v. Pugh*, 1846, 2 C. B. 611; *Laughton v. Bishop of Sodor and Man*, 1872, L. R. 4 P. C. 495; *Baker v. Carrick*, [1894] 1 Q. B. 838). Anyone who honestly believes he has a grievance is entitled to seek redress in the proper quarter (*Jenoure v. Delmege*, [1891] App. Cas. 73).

But he must apply to a person who has some duty or interest in the matter. It is not sufficient that the defendant honestly believed that such person had jurisdiction. This point was decided recently in the case of *Hebditch v. MacIlwaine*, [1894] 2 Q. B. 54. There the jury found in favour of the defendants, that they honestly and reasonably believed that the Board of Guardians had jurisdiction in the matter, and was consequently the proper authority to whom to apply. But the Court of Appeal held that finding to be immaterial. The fact was that the Board had no jurisdiction, and was not the proper authority to whom to apply; and that fact destroyed the claim of privilege.

(iv.) *Common Interest*.—Whenever two or more persons have a legitimate interest in the same matter, all communications passing between them with reference to that matter are privileged. Such common interest is generally a pecuniary one, such as two shareholders in the same company, or two creditors of the same debtor, possess. But it may also be professional, as in the case of two officers in the same corps, or masters in the



same school, anxious to preserve the dignity and reputation of the body to which they both belong. In short, it may be any interest arising from the joint exercise of any legal right or privilege, or from the joint performance of any duty imposed or recognised by the law. Thus two executors of the same will or two trustees of the same settlement have a common interest, though not a pecuniary one, in the management of the trust estate. Relations by blood or marriage have a common interest in their family concerns. So the ratepayers of a parish have a common interest in the selection of fit and proper officers to serve on the vestry or the parish council. But the "common interest" must be one which the law recognises and appreciates. No privilege attaches to gossip, however interesting it may be to both speaker and hearers. If, in fact, the defendant has no other interest in the matter beyond that which any other educated person would naturally feel, interference on his part will be deemed officious and unprivileged (*Botterill v. Whytehead*, 1879, 41 L. T. 588).

Again, a clergyman or parish priest has no right in the course of a sermon to "make an example" of a member of his flock, by commenting on his misconduct, and either naming him or alluding to him in unmistakable terms. If he does so, his words will not be privileged, although uttered with the honest desire to reform the culprit and to warn the rest of his hearers. It is quite possible that the congregation would feel more interest in this part of the discourse than in any other; but that will not create any privilege: they do not come to church to listen to attacks on their neighbours (*Magrath v. Finn*, 1877, Ir. R. 11 C. L. 152).

Many other instances might be given of occasions to which the law attaches a qualified privilege by reason of duty or interest. But the general rule is clear: Both the defendant and the person with whom he communicates must have either an interest in the subject-matter of the communication or some duty to discharge in connection with it; otherwise there is no privilege. And even where there is such a privilege, the plaintiff can destroy it by proving that the defendant was actuated by malice (see *post*, p. 447).

### III. PRIVILEGED REPORTS.

At common law any one who repeats or reports defamatory words is as liable to an action as the person who first set the falsehood in circulation. The fact that the defendant did not himself invent the story is no answer to an action for damages brought by the person defamed. For the defendant has indorsed the tale by repeating it; he has given it increased weight and credit, and started it on a fresh career of mischief. This is especially so if the repetition be in a newspaper. Hence, whenever false defamatory words were uttered at a public meeting, and reported in the local newspaper, the proprietor was liable to pay damages. It was of no avail for him to urge that there was an entire absence of malice, that the report was published in the ordinary course of his business as a journalist, that he deemed it to be his duty to present his readers with a full, true, and impartial account of what had really taken place at a public meeting on the previous evening. It is seldom that any libel is inserted in a newspaper out of actual malice. But the absence of malice affords no defence to an action unless the occasion be privileged (see *Shepherd v. Whitaker*, 1875, L. R. 10 C. P. 502). Again, it was of no avail for him to urge that the speaker was known, and that the plaintiff should have sued him, and not the paper which merely reported his remarks. The person defamed is in no way bound to sue the speaker, even though the paper named him. The speaker may not be



worth suing. Or, if he be, still the fact that some one else is liable will not affect the right of the plaintiff to sue the paper. He may sue the paper or the speaker, or both, if he likes; though he probably would not recover substantial damages from both (see *Harrison v. Pearce*, 1858, 1 F. & F. 567; 32 L. T. (O. S.) 298). It might happen that the original remark was a *bonâ fide* comment on a matter of public interest, and therefore not actionable as a slander; if so, it of course would remain a *bonâ fide* comment, and therefore no libel, when printed in the newspaper. But in every other case, if an action was brought, the paper had to pay damages, unless the words could be shown to be literally true. And it makes no difference in law that the defamatory words are precluded with such phrases as "We hear," or "We are credibly informed," or "We have it on the best authority that," etc. Such phrases will not prevent or diminish the liability of the writer. There is one exception: if, when reporting defamatory words, he named his authority—"X. told me so and so"—then he may give evidence to show that X. did in fact tell him so; but in mitigation of damages only, not as any defence to the action.

This was a sensible and salutary rule of the common law. For it is the republication in the columns of a newspaper, and not the original utterance, which seriously injures the reputation of the person attacked at such a meeting. The consequences of reporting in the local paper calumnies uttered at some political or parish meeting may be very serious. The meeting may have been thinly attended, and the audience may have known that the speaker was not worthy of credit; it was the newspaper that printed and published the falsehood to all the world. Charges recklessly made in the excitement of the moment are thus diffused throughout the country, and remain recorded in a permanent form against a perfectly innocent person. Moreover, additional importance and weight is given to such calumny by its republication in the columns of a respectable paper. Many people will believe it merely because it is in print. There is an immense difference between the injury done by such a slander and that caused by its extended circulation by the press (see the summing-up of Huddleston, B., in *Kelly v. O'Malley*, 1889, 6 T. L. R. at p. 64).

Nevertheless the rule was not without exception. It is for the public good that the proceedings in Parliament and in the Law Courts should be fully known and accurately reported, even though defamatory statements concerning individuals should thereby receive a wider circulation. Hence reports of all judicial and parliamentary proceedings were privileged at common law.

(i.) *Reports of Judicial Proceedings*.—A fair and accurate report of any proceeding held openly in any Court of law is privileged. So is every accurate transcript of any record of a Court. The privilege is not confined to newspapers or magazines. Any one may report fully any proceeding which is in its nature judicial (even though it be an *ex parte* proceeding, *Usill v. Hales*, 1878, 3 C. P. D. 319; *Kimber v. The Press Association*, 1892, 8 T. L. R. 671; (C. A.), [1893] 1 Q. B. 65); except in two cases:—

(a) When the Court has itself prohibited the publication, as it frequently did in former days. Every Court has the power of preventing the publication of its proceedings pending litigation (*R. v. Clement*, 1821, 4 Barn. & Ald. 218). But such a prohibition now is rare.

(b) When the subject-matter of the trial is an obscene or blasphemous libel, or where for any other reason the proceedings are unfit for publication; in which case it is a criminal offence to publish even a fair and



accurate report of such proceedings (*R. v. Mary Carlile*, 1819, 3 Barn. & Ald. 167; *Steele v. Brannan*, 1872, L. R. 7 C. P. 261).

Newspapers were formerly expected to reserve all report of a case till the trial was ended, but now it is clear that reports may be published of the proceedings day by day, provided the whole trial is fairly reported sooner or later (*Lewis v. Levy*, 1858, El. B. & E. 537; 27 L. J. Q. B. 282). Such a report need not be *verbatim*; it may be abridged or condensed, but it must not be partial or garbled. It is not necessary to state all that occurred *in extenso*; but if any fact be omitted which would have told in the plaintiff's favour, while other facts which tell against him are stated in full, it will be a question for the jury how far the omission is material, and whether such deviation from absolute accuracy makes the report unfair (see *Stockdale v. Tarte*, 1836, 4 Ad. & E. 1016).

The jury, in considering the question, should not dwell too much on isolated passages; they should consider the report as a whole (see *Shipley v. Todhunter*, 1836, 7 Car. & P. at p. 690). They should ask themselves what impression would be made on the mind of an unprejudiced reader who reads the report straight through, knowing nothing about the case beforehand. Slight errors may easily occur; and if such errors do not substantially alter the impression which the ordinary reader would receive, the jury should find for the defendant. If, however, there is a substantial misstatement of any material fact, and such misstatement is prejudicial to the reputation of the plaintiff, then the report is unfair and inaccurate, and the jury should find for the plaintiff. Thus, the entire suppression of the evidence of one witness may render the report unfair (see *Rumney v. Walter*, 1892, 8 T. L. R. 256).

The reporter should always report the sworn testimony of the witnesses rather than the speeches of the counsel; for counsel are often instructed to open to the jury facts which they subsequently fail to prove (*Lewis v. Walter*, 1821, 4 Barn. & Ald. 605). He should record fully the summing-up of the learned judge, which is often in itself a fair summary of the whole case (see *Milissich v. Lloyds*, 1877, 46 L. J. C. P. 404; 36 L. T. 423; *MacDougall v. Knight*, 1886, 17 Q. B. D. 636; 1889, 14 App. Cas. 194). And he must confine himself to reporting what really occurred in open Court. He must not print private gossip about the case. He must not publish evidence which might have been, but was not, given in Court (*R. v. Gray*, 1861, 26 J. P. 663). He must add no comments or anything else of his own. His duty is to reproduce precisely what happened at the trial, so as to put those who were not present as much as possible in the position of those who were. He must not in the report state his own opinion of the conduct of the parties, or discuss their motives; for no privilege will attach to these remarks. Such comments may perhaps be justifiable on another ground, that they are fair and *bonâ fide* criticism on a matter of public interest. But, if so, they should not be mixed up with the history of the case, but should be put in the form of a short paragraph or leading article (*Andrews v. Chapman*, 1853, 3 Car. & Kir. at p. 288); and they must not be published till the trial is over (*Lewis v. Levy*, *supra*).

All sensational headings to reports should be avoided. Thus, where the *Observer* published a fair and correct account of certain legal proceedings, headed, "Shameful Conduct of an Attorney," the attorney recovered damages for the heading (*Clement v. Lewis*, 1822, 3 B. & B. 297; 3 Barn. & Ald. 702). So where a similar report was headed, "How Lawyer B. treats his Clients," the judge held that this amounted to a charge that Lawyer B. *generally* treated his clients as this particular client had been



treated, and the defendant had to apologise and pay costs (*Bishop v. Latimer*, 1861, 4 L. T. 775).

Such reports are not absolutely privileged. If the plaintiff can prove that the reporter or the newspaper proprietor (whichever he has made defendant) published the report, not in the ordinary course of his duties as a journalist, but out of express malice against the plaintiff, then he will be entitled to recover damages. If, for instance, one of the parties to an action, or his solicitor, sent a fair and accurate report of the case to the papers, he (but *not* the newspaper) would be liable to pay damages, if the jury thought that he did so maliciously (*Stevens v. Sampson*, 1879, 5 Ex. D. 53). See, however, sec. 3 of the Law of Libel Amendment Act, 1888 (51 & 52 Vict. c. 64).

(ii.) *Reports of Parliamentary Proceedings*.—Every fair and accurate report of any proceeding in either House of Parliament is privileged, even though it contains matter defamatory of an individual. The analogy between such reports and those of legal proceedings is now complete; and precisely the same questions must be left to the jury in both cases. There was for a long time great doubt on this subject, which arose from the fact that there were Standing Orders of both Houses of Parliament prohibiting all such reports; and it was argued with some force that no privilege could attach to anything which was published in contravention of such Standing Orders, and which was therefore in itself a contempt of the House. But in 1868 the law was clearly and satisfactorily settled by the decision in *Wason v. Walter*, L. R. 4 Q. B. 73). See this decision discussed in Odgers' *Outline of the Law of Libel*, pp. 148–154.

(iii.) *Reports of Public Meetings, etc.*—The common law protected only fair and accurate reports of judicial and parliamentary proceedings. No other reports were privileged. This was decided in two important cases: *Davison v. Duncan*, 1857, 7 El. & Bl. 229, and *Popham v. Pickburn*, 1862, 7 H. & N. 891. Hence, if a newspaper published an accurate report of a speech made at a political meeting, or at the meeting of any vestry or town council, the proprietor was liable in damages if that speech contained defamatory matter, which was not a fair comment on a matter of public interest, and which he could not prove to be literally true. No privilege at all attached to any report, however fair and accurate, of the proceedings at such a meeting. Thus in *Purcell v. Sowler*, 1877, 2 C. P. D. 215, the proprietor of the *Manchester Courier* was held liable for a report, which was admitted to be accurate, of a discussion that had taken place on a matter of public interest at a meeting of a Board of Guardians.

It was mainly in consequence of this decision that the Newspaper Libel and Registration Act, 1881 (44 & 45 Vict. c. 60), was passed. The second section of that Act conferred a privilege, of a limited kind, on fair and accurate reports of certain public meetings. But to bring himself within the protection of this section, the proprietor or editor of a newspaper had to prove, not only that the meeting was “a public meeting,” “lawfully convened for a lawful purpose and open to the public,” and that the report was “fair and accurate, and published without malice,” but also that the publication of the matter complained of was for the public benefit. This last proviso rendered this section practically nugatory (see *Pankhurst v. Sowler*, 1886, 3 T. L. R. 193).

Another bill was brought into Parliament in 1888, which became the Law of Libel Amendment Act (51 & 52 Vict. c. 64). This considerably extended the privilege afforded by the former Act, sec. 2 of which it repealed. But it still leaves it the duty of the editor to edit all reports



of public meetings, and excise every matter that is "not of public concern, and the publication of which is not for the public benefit" (see *Kelly v. O'Malley*, 1889, 6 T. L. R. 62; *Chaloner v. Lansdown & Sons*, 1894, 10 T. L. R. 290). And note that sec. 4 of this Act is the only provision which affords any protection to reports of the proceedings of any public meeting. If the defendant claims privilege for any such report, he must show that it comes within this section; else it remains at common law unprivileged.

For a detailed history of these two important measures, see Appendix II. to Odgers on *Libel and Slander*, 3rd. ed., pp. 719-732.

#### IV. MALICE.

*When Malice is in Issue.*—To a plea of qualified privilege, it is a good reply that the defamatory words were published maliciously. Till such a plea is placed on the record, malice is no part of the issue. And the plaintiff is not bound to try and prove the existence of malice, unless and until the judge rules that the occasion is privileged. If the judge rules the occasion is not privileged, it will not avail the defendant that the jury expressly find in his favour that there was no malice on his part (*Blackburn v. Blackburn*, 1827, 4 Bing. 395; 3 Car. & P. 146; *Wenman v. Ash*, 1853, 13 C. B. 836, 845; 22 L. J. C. P. 190, 193; *Huntley v. Ward*, 1859, 6 C. B. N. S. 514; 1 F. & F. 552). The plaintiff is in that case entitled to recover damages for the injury done to his reputation, whether such injury was accidental or malicious. On the other hand, should the judge rule that the occasion was absolutely privileged, there is an end of the case; and judgment will pass for the defendant, however malicious he may have been. Should the judge rule that the occasion was one of qualified privilege, then and then only does an issue as to malice arise; in that event, the plaintiff will recover if he can prove malice in the defendant; if he cannot, his action fails. The burden of proving malice always lies on the plaintiff; and whenever the only evidence relied on for this purpose is equally consistent with *bona fides* and with malice, the judge should stop the case (*Somerville v. Hawkins*, 1851, 10 C. B. 590; 20 L. J. C. P. 131; *Taylor v. Hawkins*, 1851, 16 Q. B. 308; 20 L. J. Q. B. 313; *Spill v. Maule*, 1869, L. R. 4 Ex. 232; *Turner v. Bowley & Son*, 1896, 12 T. L. R. 402).

*What Malice is.*—"Malice" does not mean 'malice in law,' a term in pleading, but actual malice . . . a wrong feeling in a man's mind" (*Clark v. Molyneux*, 1877, 3 Q. B. D. at p. 247). Mere stupidity or forgetfulness is not malice, nor is negligence, nor careless blundering, nor want of sound judgment, nor honest indignation. But it is proof positive of malice if the jury are satisfied that the defendant did not honestly believe in the truth of the charge he made at the time he made it. It never can be a man's duty to circulate a falsehood.

*Evidence of Malice.*—The existence of malice may be established in two ways:—

(a) By *extrinsic* evidence showing that there were former disputes or actual ill-feeling between the parties, or other libels or slanders published by the defendant of the plaintiff, whether before or after those sued on (*Chubb v. Westley*, 1834, 6 Car. & P. 436).

(b) By *intrinsic* evidence, such as the unwarranted violence of the defendant's language, or the unnecessary extent of the publication (see *Fryer v. Kinnersley*, 1863, 15 C. B. N. S. 422; 33 L. J. C. P. 96; *Gilpin v. Fowler*, 1854, 9 Ex. 615; 25 L. J. Ex. 152; *Spill v. Maule*, 1869, L. R. 4 Ex. 232).

Thus, if a servant can show that her master, whether from any ill-



feeling against her, or from a desire to retain her in his own service, gave her a bad character when he knew that she deserved a good one, that would prove that he was acting maliciously, and all privilege would be lost. So if she can satisfy the jury that the former master made statements about her character or her work, recklessly, not knowing or caring whether they were true or false, such recklessness is evidence of malice to go to the jury (*Rogers v. Sir Gervas Clifton*, 1803, 3 Bos. & Pul. 587; *Fountain v. Boodle*, 1842, 3 Q. B. 5; *Jackson v. Hopperton*, 1864, 16 C. B. N. S. 829; 12 W. R. 913).

So, too, in answering a confidential inquiry made by one who has a right to be told the facts, each statement should be made under a serious sense of responsibility and with an honest desire to deal fairly with the plaintiff as well as with the person who asks for the information. The defendant must be especially careful, if he is merely repeating something that he has heard, not to heighten its colour or exaggerate its import; he should tell his correspondent that he does not know it of his own knowledge, but only by hearsay; he should not state a rumour as a fact. Above all, he must honestly believe in the truth of the charge he makes at the time he makes it. And this implies that he must have *some* ground for the assertion; it need not be a conclusive or convincing ground; hearsay will be sufficient, if from a reliable source; but no charge should ever be made recklessly and wantonly, even in confidence. And this is still more imperatively necessary where the information is volunteered; there it is not enough that the defendant sincerely believed in the truth of what he wrote, the jury must also be satisfied that he wrote it under a strong sense of duty which compelled him to take the unusual course of communicating with the person concerned before any inquiries were made (*Botterill v. Whytehead*, 1879, 41 L. T. 588).

Communications which impute crime or misconduct to others should always be made with the honest desire to promote the ends of justice, and not with the purpose of obtaining any indirect advantage for the writer. Serious accusations should not be made recklessly or wantonly; they must always be warranted by some circumstances reasonably arousing suspicion (*Stuart v. Bell*, [1891] 2 Q. B. 341). They must not be made unnecessarily to persons whom they do not concern, nor before more persons, nor in stronger language, than necessary (*Padmore v. Lawrence*, 1840, 11 Ad. & E. 380). And even where they are addressed to the proper person who has jurisdiction to deal with the matter, still the jury may hold that the defendant acted maliciously, if he eagerly seized on some slight and frivolous matter and made no proper inquiry into the merits, but wrote or spoke the words without satisfying himself that the account of the matter that had reached him was correct (*Fairman v. Ives*, 1822, 5 Barn. & Ald. 642; 24 R. R. 514).

So with statements which a defendant deems it necessary to make in order to protect his private interests or interests which he holds in common with others. In the first place, the defendant must honestly believe that he possesses the right which he claims. And this involves that he must have some ground for making such a claim (per Maule, J., in *Pater v. Baker*, 1847, 3 C. B. at p. 868). Next, in claiming a right for himself, or in resisting a claim made by another, the defendant must be careful to use temperate language, and to restrict himself to matters relevant to the claim. It is seldom necessary in self-defence to impute evil motives to others, or to charge your adversary with dishonesty or fraud. If, therefore, in writing or speaking on a privileged occasion the defendant breaks out into



irrelevant charges against the plaintiff, such excess may be some evidence of malice (*Huntley v. Ward*, 1859, 6 C. B. N. S. 514; *Warren v. Warren*, 1834, 1 C. M. & R. 251).

Still, if the defendant honestly believed the plaintiff's conduct to be such as he described it, the mere fact that he used strong words in so describing it is no evidence of malice to go to the jury. The test appears to be this: The jury should take the facts as they appeared to the defendant's mind at the time of publication, and then ask themselves whether the terms used are such as the defendant might have honestly employed under the circumstances? If so, the strength of his language points to *bona fides* rather than to malice. It is not enough that the expressions are angry, the jury must go further and see that they are malicious. "A man may use excessive language, and yet have no malice in his mind" (per Lord Esher, M. R., in *Nevill v. Fine Art, etc., Co. Ltd.*, [1895] 2 Q. B. at p. 170).

**Privilegium clericale.**—See BENEFIT OF CLERGY.

**Privy.**—(See also ASHPITS, vol. i. p. 341.) Under the Public Health Acts, local sanitary authorities have large powers and duties for securing proper privy accommodation for houses. No house may now be newly erected or rebuilt without a sufficient water-closet, earth-closet, or privy (38 & 39 Vict. c. 55, s. 35). This, however, may be for the use of two or more houses in common, if the accommodation provided is sufficient (*Clutton Union v. Pointing*, 1879, 4 Q. B. D. 340). Where an existing house appears to a local authority, on the report of their surveyor or inspector of nuisances, to be without proper accommodation, the local authority *shall* require the owner or occupier to provide what they deem necessary. If their notice is not complied with, they may themselves do the required work at the expense of the owner (s. 36). But if, in their opinion, a privy used in common by the inmates of two or more houses is sufficient, they need not interfere (*ibid.*). The local authority may also require separate accommodation to be provided for factories or buildings, in which persons of both sexes are employed in any manufacture, trade, or business. Any person who neglects or refuses to comply with such requirement is liable to a penalty (s. 38). The powers of this section were extended in 1887 to portions of a coal mine above ground in which girls and women are employed (50 & 51 Vict. c. 58, s. 74). In urban districts, where the Public Health Act, 1890 (53 & 54 Vict. c. 59), is in force, sec. 88 of the Act of 1875 is repealed, and in its stead sec. 22 of the later Act applies. By it every building used as a workshop or factory, or where persons are employed or intended to be employed in any trade or business, whenever it was erected, must be provided with sufficient and suitable accommodation in the way of sanitary conveniences, and, where persons of both sexes are employed, with proper separate accommodation for persons of each sex. The urban authority may require the owner or occupier of such building to make such alterations or additions therein as may be required to give such accommodation. An urban authority may also, if they think fit, themselves provide and maintain, in proper and convenient situations, privies, etc., for public accommodation (Act of 1875, s. 39). The choice of situation is intrusted to the urban authority, but they cannot place these conveniences in private ground against the will of the owner (*Sellors v. Matlock*



*Board*, 1885, 14 Q. B. D. 928; *Baird v. Tunbridge Wells*, [1894] 2 Q. B. 867).

Local authorities have the duty of seeing that privies, drains, etc., are so kept as not to be a nuisance or injurious to health (s. 40). For this purpose they have power to enter and examine suspected premises; and if they find anything amiss, shall forthwith require the owner or occupier of the premises to do such works as in their judgment are necessary. Non-compliance with such a notice entails a penalty for every day's default (s. 41; see also 53 & 54 Vict. c. 59, ss. 19 and 21). If the owner or occupier is summoned for such default, the Court of summary jurisdiction cannot inquire whether the works ordered were really necessary; that is a matter to be determined by the local authority (*Hargreaves v. Taylor*, 1863, 3 B. & S. 54).

Besides the above power for requiring that privies, etc., if insufficient or out of repair, shall be put right, local authorities, where they are so foul or in such a state as to be a nuisance or injurious to health, may have them dealt with summarily (Act of 1875, s. 91). If the magistrates who hear the case are satisfied that the alleged nuisance exists, or is likely to recur, they must make an order requiring the nuisance to be abated and the execution of any works necessary for that purpose (*idid.* s. 96). Penalties are imposed for disobedience to such an order, and the local authority are in such case empowered to enter the premises and abate the nuisance, and do whatever may be necessary in execution of such order, at the expense of the person on whom the order was made (s. 98). It seems now to be settled that the local authority are the proper body to decide what works are required (*Hargreaves v. Taylor*, *supra*; *Clerkenwell Vestry v. Feary*, 1890, 24 Q. B. D. 703), and that the justices should by their order direct them to be done (see further, NUISANCE).

Similar powers as to *London* are given now by 54 & 55 Vict. c. 76, ss. 37-46. Every house newly erected or rebuilt must have one or more proper and sufficient *water-closets*. Old houses may be left with such accommodation in common if the sanitary authority deem this sufficient, but a new house must apparently have separate accommodation for itself (s. 37). Factories *must* be provided with sufficient and suitable sanitary conveniences, and the sanitary authorities are charged with the duty of seeing that this requirement is complied with (s. 38). The County Council and the sanitary authority are both required to make by-laws dealing with *water-closets*, and the County Council with other conveniences also (s. 39). Penalties are imposed on various acts of neglect or misfeasance whereby sanitary conveniences may become offensive or a source of danger to health (ss. 41, 42); and sanitary authorities are themselves empowered, if they think fit, to enter on premises and execute such works as may be necessary for the abatement of the nuisance (s. 43). They are expressly empowered to provide and maintain public sanitary conveniences in neighbourhoods where they deem the same to be required. And, in order to avoid doubts which were raised by some earlier decisions (*supra*), it is declared that the subsoil of any road is for this purpose vested in the sanitary authority (s. 44). Where they provide them, they may make regulations and by-laws for their management, and charge fees for the use of lavatories or *water-closets*. It is also provided that henceforth no public convenience shall be erected in or accessible from any street without the consent in writing of the sanitary authority; this, however, does not apply to railway stations (s. 45).



**Privy Council.**

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*History.*—In the Middle Ages it was an accepted rule of English constitutional practice that the king ought to act in matters of importance with the advice of the *magnates* or great men of the realm. The nobles, assembled on special occasions by special writs, formed the Great Council or Common Council of the realm, which developed into the Parliament. The chief advisers of the king, who were permanently about him, formed the Permanent or Continual Council. This body included the Justiciar (while there was a Justiciar), the Chancellor, the Lord Treasurer, and other officers of State, and the two archbishops, who claimed a right to form a part of every Council, public or private. In 1404 the Council consisted of three bishops, nine peers, six knights, and one untitled person; the councillors usually held office for the life of the king who appointed them, and they received a salary. At this period the various powers of government were not accurately distinguished; the King in Council exercised legislative, executive, and judicial authority. During the minority of Henry VI. the functions of the councillors regularly attending were very important; a distinction began to be drawn between the general body of councillors, sometimes called by historians the Ordinary Council, and the Privy Council, which included only those who were confidentially employed in business of State.

While the Council retained and strengthened its position, its powers were gradually restricted by the development of other institutions. In the first place, Parliament claimed exclusive authority in matters of legislation; and it was contended by common lawyers that the King in Council could not alter the law by proclamation. By the 31 Hen. VIII. c. 8 the king's proclamation acquired the force of law; but this Act was repealed by 1 Edw. VI. c. 12; and in the Case of Proclamations (12 Rep. 74), Coke induced the judges to declare that the king could create no new offence by proclamation.

In the second place, the executive business of the nation became in time too complicated to be controlled by a single Board. Separate departments were organised, under ministers who communicated directly with the king and with Parliament. The two Secretaries of the Council became Secretaries of State; and this was the origin of the five secretarial departments now existing. In the seventeenth century, there were frequent complaints in the House of Commons that the king had given up the old custom of debating matters of State "publicly, at the Council table," and was guiding himself by the advice of a cabinet or cabal. After the Restoration, the custom of consulting the whole body of the councillors fell into disuse; Charles II. was of opinion that the number of the Council made it "unfit for the secrecy and despatch which are necessary in many great affairs." In 1679 the king was persuaded to adopt a plan of reconstruction prepared by Sir W. Temple; a representative Council of thirty was appointed; but this body was found to be too large, and the king once more had recourse to a cabinet or confidential committee of Council. Down to the end of Queen Anne's reign, the sovereign was present at Cabinet meetings; but when George I., who knew no English, came to the throne, the king's confidential servants met without him; the king's



approval of their resolutions was obtained by one of their number, who enjoyed the royal confidence in a special degree. The accession of the house of Hanover thus marks the transition from personal government to the modern system of government by Prime Minister and Cabinet.

In the third place, the judicial authority of the Council, discredited by the oppressive use which was made of it by the Tudors and the Stuarts, was reduced to narrow limits by the legislation of 1640. After the establishment of the Courts of common law, petitions for justice continued to be presented to the King in Council, especially in cases when the Courts were liable to be intimidated by a powerful defendant. If such a petition raised a question of law, it was usually referred to the Chancellor, and in time the Court of Chancery became a recognised branch of the judicature. But the king and his councillors still retained a wide jurisdiction as a tribunal of first instance; they inflicted severe punishments, and their sentences were felt by many to be oppressive, because they were pronounced after inquiries conducted in the Council chamber, without the safeguards of trial by jury. By the 3 Hen. VII. c. 1 and the 21 Hen. VIII. c. 2 this jurisdiction was expressly confirmed. These Acts have sometimes been regarded as giving authority for the establishment of the Court of Star Chamber; but the Star Chamber was in fact the Council, or a committee of Council, though it usually included some judges, not employed by the king in matters of State, and therefore perhaps not to be described as members of the Privy Council. By the 16 Car. I. c. 10 the Star Chamber and its jurisdiction were abolished. Since the passing of that Act, the Council has not exercised the powers of a tribunal of first instance. All privy councillors are qualified to act as magistrates, and in case of necessity the Council may make inquiries, but it cannot punish offences, and a person committed by order of the Council may sue out his writ of *habeas corpus*. The Act of 16 Car. I. did not take away the appellate jurisdiction of the King in Council. It has always been a rule of our constitution that the subject who failed to obtain justice in the ordinary Courts might go in the last resort to the king himself. Petitions for the correction of errors in the proceedings of the Courts were presented to the King in Parliament or to the King in Council. The king's English subjects preferred to go to the King in Parliament, and in course of time the House of Lords was recognised as the Court of final appeal for England, and for the United Kingdom generally. The king's subjects beyond seas found that their petitions were more speedily heard if addressed to the King in Council; the Council Board thus became the tribunal of final appeal for the colonies and India. In 1832 appeals in ecclesiastical cases were transferred from the High Court of Delegates to the King in Council.

The history of the Privy Council is fully treated in Mr. Dicey's well-known essay, and in Sir W. Anson's *Law and Custom of the Constitution*, pt. ii. ch. iii. The *Proceedings and Ordinances of the Privy Council*, edited by Sir H. Nicolas, are brought down to the reign of Henry VII.; the series is continued in the *Acts of the Privy Council*, edited by Mr. J. Roche Dasent; the last volume published brings the record down to 1582.

At the union with Scotland it was enacted by the 6 Anne, c. 40, that there should be one Privy Council for Great Britain. For the history of the Scottish Council, see the *Register of the Privy Council of Scotland*, edited by J. Hill Burton and David Masson. At the union with Ireland, that country was allowed to retain its separate Privy Council. In some British colonies, the governor is assisted by a body of advisers styled the Privy Council; in all the colonies the powers of the Executive Council are modelled to some extent on those exercised by Her Majesty in Council.



*The Privy Council at the Present Day.*—The true Privy Council of the present day is the Cabinet, but we continue to give the old name to a large body of eminent persons, most of whom are never consulted by the Crown in matters of State. There are now more than two hundred privy councillors; they may be roughly classified as follows:—1. A number of noblemen, selected chiefly from those of the highest rank. These may be taken to represent the *magnates* or great men of the realm. 2. Persons who hold or have held high political office. A person who is appointed a Secretary of State, for example, or President of the Board of Trade, is always sworn of the Council. Subordinate members of the ministry are not usually made privy councillors, unless by way of special distinction. Members of the diplomatic service who attain the rank of ambassador are usually added to the Council. Persons engaged permanently in any department of the public service are not appointed, unless on retirement after long and distinguished service. 3. The Lord Chancellor, the Lords of Appeal in Ordinary, the Lord Chief-Justice of England, Master of the Rolls, and President of the Probate, etc., Division are always privy councillors, as also are the Lords Justices of Appeal, the Lord President of the Court of Session in Scotland, and the Lord Justice-Clerk. Judges of the High Court are not appointed, unless on retirement. The English law officers are not usually privy councillors; the Lord Advocate for Scotland is. 4. The Archbishops of Canterbury and York and the Bishop of London always have seats at the Board; other bishops are added only by way of special distinction. 5. Persons distinguished in colonial politics have been appointed by way of reward for conspicuous services to the empire; and in 1897 the Premiers of all the colonies which have responsible government were sworn of the Council. 6. In a few cases the rank of privy councillor has been conferred upon persons highly distinguished in science or in letters.

These eminent persons are described collectively as the Lords and others of Her Majesty's Most Honourable Privy Council, and each of them is entitled to be addressed as Right Honourable. When they are assembled as a Board, the place at the head of the table is Her Majesty's, and in her absence it is vacant. The Lord President of the Council sits on her right hand, the Lord Chancellor on her left; the other councillors according to their precedence, as determined by rank and seniority of standing. Differences have arisen from time to time as to the order of precedence, and a pamphlet on the subject was printed by C. G. Young in 1860.

A privy councillor is appointed without patent or other formal grant; the Queen invites him to take his seat at the Board, and thereupon he is sworn to advise the Queen according to the best of his cunning and discretion; to advise for the Queen's honour and the good of the public, without partiality through affection, love, need, doubt, or dread; to keep the Queen's counsel secret; to avoid corruption; to help and strengthen the execution of what shall be resolved; to withstand all persons who would attempt the contrary; and generally to observe, keep, and do all that a true counsellor ought to do to his sovereign lord. A privy councillor holds office during the life of the sovereign who appoints him, and for six months thereafter; according to modern practice, the appointment is renewed on a demise of the Crown. The sovereign may at any time strike the name of a privy councillor from the list. George III. is said to have struck off Mr. Fox's name with his own hand; at the present day it is not probable that such a step will be taken unless on the advice of a responsible minister. The duties imposed on a privy councillor as such are now



merely nominal, and there is no salary or allowance attached to the position.

Meetings of the whole Council are held only on occasions of state and ceremony, as at the beginning of a new reign, or when the reigning sovereign announces his or her marriage. On such occasions the Lord Mayor of London is summoned to attend the Council.

Formal meetings of the Council are held as public business may require—usually about eight times a year. To these meetings the Queen summons only the few councillors who happen to be in immediate attendance. Formerly, when matters of State were “publicly” discussed at the Board, a councillor not summoned would sometimes insist on his right to be present. The business of the Council is now of a formal nature. The orders submitted for Her Majesty’s approval have been prepared, and, if necessary, explained to Her Majesty by the responsible officers of the departments from which they come. The legal powers of the Council are for the most part so framed that they cannot be exercised unless Her Majesty is present. But the Council may meet, and, if empowered to do so, may make orders in the absence of the sovereign. For the form of an order so made, see *The Hendrick*, 1 Act. 324.

The Lord President of the Council is appointed by a declaration made in Council by Her Majesty; he is a Cabinet minister of the highest rank. The office of the Clerk of the Council dates from 1540; all orders made in Council are authenticated by the signature of the Clerk. By the Act of 1833, which constituted the Judicial Committee, the king was empowered to appoint a Registrar of the Privy Council.

Throughout its history the Council has been accustomed to do most of its business by means of committees. The Cabinet, the Board of Trade, the Local Government Board, the Education Department, and the Board of Agriculture are all, in their origin, Committees of Council. Of the Judicial Committee it will be necessary to speak more at length.

*The Judicial Committee.*—Down to 1833 appeals to the King in Council were few in number; they were heard by committees specially appointed, usually in vacation, when the judges were free to attend. By the 3 & 4 Will. IV. c. 41, a Judicial Committee was constituted, to consist of all members of the Privy Council holding or having held the office of Lord President or Lord Chancellor, or any of the high judicial offices enumerated in the Act. The provisions of the Act have since been extended to all the high judicial offices mentioned in the Appellate Jurisdiction Acts of 1876 and 1887. The Lords of Appeal in Ordinary are members of the committee.

By the Act of 1833 the king was empowered by his sign manual to appoint “any two other persons being privy councillors” to be members of the committee. Lord Hobhouse and Lord James of Hereford are the existing members added to the committee under this power.

By the same Act it was provided that two members of the Privy Council, having held the office of judge in the East Indies or in any of His Majesty’s dominions beyond seas, and attending the sittings of the committee, should be entitled to receive an allowance of £400 a year each during their attendance. By the 50 & 51 Vict. c. 70, it was enacted that if there should be only one such member of the committee, he might be permitted to draw both allowances. Sir Richard Couch is at present the only member of the committee appointed under these rules.

By the 58 & 59 Vict. c. 44, it was enacted that the judges of certain colonies (the self-governing colonies) should, if members of the Privy Council, be members of the committee. In 1897 the Chief-Justices of



Canada, Cape Colony, and South Australia were sworn of the Council, and became members of the committee.

In cases arising under the Clergy Discipline Acts, the Board is assisted by three bishops as ecclesiastical assessors. The two Archbishops, the Bishop of London, and the other bishops attend in their turns, as fixed by the Order in Council of the 28th November 1884. In appeals from Colonial Admiralty Courts, two nautical assessors are usually in attendance. In all cases where assessors attend, they are in no way responsible for the judgment of the Board; they are present merely to give an opinion on points with which their lordships are not professionally familiar.

The right of audience at the bar of the Privy Council belongs to members of the English, Scottish, or Irish Bar, and to those Indian and Colonial practitioners whose position corresponds to that of barristers in this country. The persons qualified to practise as agents before the Privy Council, are English solicitors or proctors, Scotch Writers to the Signet, etc., who have been admitted and placed on the roll at the Council Office as directed by the Order in Council of the 6th March 1896. Solicitors, etc., not practising in London, are usually required to give a London address at which they may be served with notices, etc.

The committee sits at the Council Chamber, Whitehall, and the forms of a Committee of Council are carefully observed. Counsel and parties are directed to withdraw if their lordships have occasion to deliberate; and the judgment takes the form of a report to Her Majesty; if there is any difference of opinion, the report embodies the views of the majority, and dissenting opinions are not published. In the case of *Ridsdale v. Clifton* (1877, 2 P. D. 276), Kelly, C.B., maintained that he had a right to let it be known that he did not agree with the report; his action led to an interesting controversy. An Order in Council of the 4th February 1878, confirming an old Order of the 20th February 1627, directed that the "ancient rule and practice of the Privy Council" should be observed in the Judicial Committee, and that no publication should be made how the particular voices and opinions went. For a list of the pamphlets and letters written on this occasion, see Phillimore, *Ecclesiastical Law*, 2nd ed., p. 976.

The jurisdiction of the committee is derived from the orders of reference made by the Queen in Council. In the month of November in each year a General Order is made, referring all appeals to H.M. in Council to the committee. Petitions for the extension of the term of letters patent are specially referred under sec. 25 of the Patents Act, 1883. See PATENTS. Her Majesty may also refer legal questions of a general nature to this committee; but their lordships will usually interpret the terms of such a reference rather strictly; and they will decline to express an opinion, in general terms, on questions which may afterwards come before them for judicial determination (see the article MALTA). In some cases, questions which are both legal and political are referred to a mixed committee. Where the removal of a colonial judge is in question (see the articles AMOTION; COLONY), the Colonial Secretary sits with the members of the Judicial Committee; where the rights of the States of Jersey have been brought into question, the matter in dispute may be referred to a committee for Jersey and Guernsey, on which the Home Secretary sits with some of the members of the Judicial Committee.

*Appeals to the Queen in Council.*—There is an appeal to H.M. in Council from the highest civil Court of each separate colony or province of her dominions beyond seas, whether it is a Court of error or not. This is sometimes described as an appeal as of right; but the appellant is usually



required to obtain leave from the Court whose judgment is appealed against; and the right to appeal may be restricted by imperial enactment, by Order in Council, by the rules of practice observed in the committee, or by local legislation.

Speaking generally, there is no appeal as of right, unless from a final and definitive judgment. The appellant must prove his good faith by entering and prosecuting his appeal within a year and a day. To these restrictions the local law usually adds these three requirements: that leave to appeal must be asked within a certain time; that the value of the matter in dispute must exceed a certain sum; and that the appellant must find security for costs.

Appeals may be admitted by special leave in cases where there is no appeal in the ordinary course. Her Majesty may give leave to appeal from an interlocutory order, where it appears that the case can be substantially disposed of without waiting for final judgment. In a case where unreasonable delay was permitted in the Court below, their lordships ordered a petition for leave to appeal to stand over, and intimated that, unless the case was disposed of within four months, they would advise Her Majesty to give leave to appeal from an interlocutory order. Leave to appeal may be given where it appears that some important right or principle is brought into question, although the value of the matter in dispute may be less than the required amount. In criminal cases their lordships will not advise Her Majesty to grant leave, unless there is reason to apprehend that a serious miscarriage of justice may have taken place, or that the Court below has acted without jurisdiction.

The conditions on which appeals are admitted from the Queen's dominions beyond seas are contained in local and imperial statutes, charters of justice, and Orders in Council too numerous to be here set out. The following summary makes no pretence to completeness; it indicates the authorities to which reference may be made in case of doubt or dispute. For further information, see the tabular statement in Macqueen's *Appellate Jurisdiction*, 1842 ed., at p. 699, and the particulars given in an Appendix to Mr. Gerald Wheeler's *Confederation Law of Canada*; see also Mr. George Wheeler's *Privy Council Law*.

*Summary of Conditions of Appeal.*—*Aden.*—Appeal to the High Court at Bombay, thence to H.M. in Council.

*Africa.*—Order in Council. Hertslet, xviii. 1.

*Bahamas.*—Petition within fourteen days. See 1 Bah. Laws, 224; Clark, *Col. Law*, 378.

*Barbadoes.*—The local law of 1857 provided for an appeal from the Chief-Justice, but appeals are now taken to the Court of Appeal for the Windward Islands (*q.v.*), and thence to H.M. in Council. Petition within fourteen days; value, £500.

*Bengal.*—The old rules are given in Macpherson's *Practice*; for the existing rules, see under *British India*.

*Bermuda.*—Petition within fourteen days; value, £500.

*Bombay.*—Old rules in Macpherson's *Practice*; existing rules as for *British India*.

*British Central Africa.*—Order in Council. Hertslet, xix. 8.

*British Columbia.*—Appeals may be taken to the Supreme Court of Canada, or from the Supreme Court of the Province to H.M. in Council.

*British Guiana.*—Petition within fourteen days; value, £500. Orders in Council, 23rd April and 30th June 1831; 1 Laws of B. G. 35.



*British Honduras*.—Appeal direct, or through the Supreme Court of Jamaica.

*British India*.—For conditions of appeal, see the Code of Civil Procedure, s. 5.

*British New Guinea*.—Appeal to Supreme Court of Queensland, thence to H.M. in Council. Hertslet, xviii. 697.

*British North Borneo and Brunei*.—See the article LABUAN.

*Burma*.—See under *British India*.

*Canada*.—Appeal from the Supreme Court of Canada only by special leave.

*Cape of Good Hope*.—Petition within fourteen days; value, £500. See 1 Cape Statute Law, 220; and Clark, *Col. Law*, 487.

*Ceylon*.—See Clark, *Col. Law*, 563.

*China*.—Appeal from the Supreme Court at Shanghai; value, \$2500. From British Courts in *Corea*, through Shanghai.

*Cyprus*.—Petition within fourteen days; value, £500. Orders in Council, 15th July 1881 and 30th November 1882.

*Dominica*.—The right to appeal directly to H.M. in Council appears to have been superseded by the establishment of the Supreme Court of the Leeward Islands.

*Egypt*.—Appeal from Consular Courts to Supreme Court at Constantinople, thence to H.M. in Council; see under *Turkey*.

*Falkland Islands*.—Appeal from Governor in Council.

*Fiji*.—Petition within fourteen days; value, £500. Orders in Council, 22nd February 1878 and 15th March 1893.

*Gambia*.—Appeal to Appeal Court of Sierra Leone, thence to H.M. in Council. See Statutory Rules, 1891, p. 24; and, for the Territories, Statutory Rules, 1893, p. 311.

*Gibraltar*.—Petition within fourteen days; value, £300. Charter of Justice, Clark, *Col. Law*, 688; Order in Council, 17th November 1888; and Gibraltar Laws.

*Gold Coast*.—Petition, fourteen days; value, £500. Order in Council, 23rd October 1877; and, for the Territories, 29th December 1887.

*Grenada*.—See under *Windward Islands*.

*Griqualand West*.—Now part of Cape Colony.

*Hong Kong*.—The rules of the Supreme Court are now under revision; see the article HONG KONG.

*Jamaica*.—Petition, fourteen days; value, £500. Order in Council, 14th April 1851.

*Japan*.—From the Court for Japan through Shanghai. Hertslet, xii. 281, and xiv. 246.

*Jersey*.—Appeal asserted when judgment given; value: land, £5 a year; personalty, £80.

*Labuan*.—There seem to be no regulations.

*Lagos*.—Petition, fourteen days; value, £500. Order in Council, 5th July 1889; and, for the Territories, 29th December 1887.

*Leeward Islands*.—Petition, fourteen days; value, £300. See under *West Indies*.

*Madras*.—Old rules in Macpherson's *Practice*; new rules as for *British India*.

*Malta*.—Petition, fourteen days; value, £1000. Clark, *Col. Law*, 719.

*Manitoba*.—Through Supreme Court of Canada, or direct appeal; petition, fourteen days; value, £300.

*Mashonaland and Matabeleland*.—Through the Supreme Court of Cape Colony.



*Mauritius*.—Petition, fourteen days; value, £1000. Clark, *Col. Law*, 586.

*Montserrat*.—See under *Leeward Islands*.

*Morocco*.—Appeal from Consular Courts to Gibraltar, thence to H.M. in Council.

*Muscat*.—Appeal to High Court at Bombay, thence to H.M. in Council.

*Natal*.—Petition, fourteen days; value, £500.

*Nevis*.—See under *Leeward Islands*.

*New Brunswick*.—Through Supreme Court of Canada, or direct appeal; petition, fourteen days; value, £300.

*Newfoundland*.—Value, £500. Clark, *Col. Law*, 433.

*New South Wales*.—Petition, fourteen days; value, by local statute, £2000; but Order in Council of 9th June 1860 permits appeal if value is £500.

*New Zealand*.—Petition, fourteen days; value, £500. Orders in Council, 30th November 1864 and 16th May 1871.

*North-West Territories*.—Through Supreme Court of Canada, or direct appeal; petition, fourteen days; value, £300.

*North-West Provinces*.—See under *British India*.

*Nova Scotia*.—Through Supreme Court of Canada, or direct appeal; petition, fourteen days; value, £300.

*Ontario*.—Through Supreme Court of Canada, or direct appeal; value, \$4000.

*Oudh*.—See under *British India*.

*Persia*.—Appeal from Consul-General's Court; petition, fifteen days; value, £500. Hertslet, xviii. 945. From Persian coasts and islands, through Bombay. Hertslet, xviii. 1024.

*Prince Edward Island*.—Through Supreme Court of Canada, or direct appeal.

*Quebec*.—Through Supreme Court of Canada, or direct appeal; value, £500.

*Queensland*.—Petition, fourteen days; value, £500. Order in Council, 30th June 1860.

*St. Christopher*.—See under *Leeward Islands*.

*St. Helena*.—Petition, fourteen days; value, £500. Order in Council, 13th February 1839.

*St. Lucia* and *St. Vincent*.—Appeals to Court of Appeal of Windward Islands, or in some cases direct appeal to H.M. in Council.

*Sarawak*.—See article LABUAN.

*Seychelles*.—See under *Mauritius*.

*Siam*.—Appeal to Supreme Court of the Straits Settlements, and thence to H.M. in Council.

*Sierra Leone*.—Petition, fourteen days; value, £300, or £400 as fixed by Charter of Justice of 1821.

*South Australia*.—Petition, fourteen days; value, £500.

*Straits Settlements*.—Petition within six months; value, \$1500. Ordinance 12 of 1879.

*Tasmania*.—Petition, fourteen days; value, £1000. Clark, *Col. Law*, 653.

*Trinidad and Tobago*.—Value, £500. Orders in Council, 23rd April and 30th June 1831.

*Turkey*.—Appeal from Supreme Consular Court at Constantinople; petition, fifteen days; value, £500.

*Turks and Caicos*.—Petition, thirty days; *Laws of T. and C.* p. 80.



*Victoria*.—Petition, fourteen days; value, £500. Order in Council, 9th June 1860, and Victoria Statutes.

*Western Australia*.—Petition, fourteen days; value, £500.

*Western Pacific*.—Appeal to Supreme Court of Fiji, and thence to H.M. in Council.

*West Indies*.—Imperial Act 13 & 14 Vict. c. 15, and Orders in Council made thereunder.

*Windward Islands*.—Petition, fourteen days; value, £500.

*Zanzibar*.—Appeal to High Court at Bombay, and thence to H.M. in Council.

*Proceedings on Appeals*.—When an appellant has obtained leave from the local Court or from H.M. in Council to enter his appeal, his first duty is to obtain a transcript of the proceedings and evidence, together with the reasons given for the judgment appealed from. If the appeal is from an appellate Court, the reasons given for the judgment of the Court of first instance should be included in the transcript. The costs of preparing the transcript are costs of the appeal, but they are incurred in the Court below, and must, if necessary, be taxed there. Transcripts may be printed abroad; in this case fifty copies must be sent to England, two of which must be certified under the seal of the Court from which they come. When the transcript is forwarded in writing, the appellant may call on the Registrar to cause it, or such part thereof as may be necessary, together with such parts as the respondent may require, to be printed. By the Order in Council of 13th June 1853, a time is fixed within which the transcript must be printed. If no effectual steps are taken for the prosecution of the appeal within the time fixed, it stands dismissed without further order.

When the transcript arrives, or earlier if he sees occasion, the appellant prepares his petition of appeal, which ought to contain merely an abstract of the proceedings below, with a conclusion praying that Her Majesty will be pleased to order that the judgment appealed from may be reversed or varied. The petition of appeal is not usually printed.

The petition of appeal having been lodged, the agents for the respondent should enter a formal appearance, by giving notice in writing to the registrar. If different respondents are represented by different agents, all should enter formal appearance; but they are not justified in incurring the expense of separate counsel, etc., if the questions in the appeal are such as can be argued on behalf of all the respondents together. If the respondent fails to appear, the appellant may obtain an order for a summons to appear within two months; and, if at the end of that time no appearance has been entered, the appellant is entitled to a peremptory order calling on the respondent to appear within six weeks; at the end of which time, if the respondent is still in default, the appellant will be allowed to set down the appeal *ex parte*.

The printed cases of the appellant and respondent contain an abstract of the facts out of which the appeal has arisen, together with a short statement of the reasons offered by the parties for reversing or affirming the judgment of the Court below. After both cases are lodged, the agents exchange copies; but neither party can obtain a sight of his adversary's case until he lodges his own. Where an appendix of documents referred to in the case is required, it should be a joint-appendix; a separate appendix is not permitted, unless on an affidavit of the refusal of the opposite party to unite in a joint-appendix. A party who has lodged his case is entitled to an order requiring his opponent to lodge his case within a month, and, at the end of that time, to a peremptory order requiring the delivery of the



case within a fortnight. When both cases are lodged, the appeal is set down for hearing; or, if one party is in default, the other party may set it down *ex parte*.

Petitions for appearance orders, case orders, and orders of consolidation, or for directions in matters of procedure, are addressed to the Right Hon. the Lords of the Judicial Committee. The order made on such a petition is a committee order, and is issued from the Council Office as soon as the matter is disposed of at the Board. On the other hand, petitions for leave to appeal, for revivor, for leave to intervene or add parties, or for the dismissal of the appeal, are addressed to the Queen's most excellent Majesty in Council, and the committee humbly advise Her Majesty to make the appropriate order on such a petition at the next Council after the petition has been heard.

The Order in Council of 13th June 1853 directs that the appellant must make application for the printing of the transcript within six months if the appeal comes from any colony, etc., east of the Cape of Good Hope; within three months if it comes from any other part of the Queen's dominions abroad. If no effectual steps are taken within the time limited, the appeal stands dismissed without further order. Macpherson holds that these provisions have practically superseded the old rule, that the proceedings must be transmitted and the petition of appeal presented within year and day.

Notice having been given to the parties, the appeal comes on for argument. As a general rule, their lordships will hear two counsel on each side on the hearing of an appeal; one counsel on each side on the hearing of a petition. Where two appellants or respondents are adverse to each other, their cases may be separately heard; but when separate counsel are employed without necessity, only one set of costs will be allowed. Where a difficult question of law arises, their lordships have sometimes directed the case to be re-argued before a more numerous Board by one counsel on each side.

The committee will hear an argument on any point of law, whether it has been taken in the Court below or not. They will decline to hear any argument on questions of fact which might have been, and have not been, raised in the Court below. The materials before the committee are those contained in the printed record. If a party wishes to refer to documents or facts not adduced in the Court below, he should, before the hearing, present a petition, addressed to the Lords of the Committee, and the application should be made on notice to the other side. The committee is empowered to take evidence; and in matters specially referred, *e.g.* on the hearing of a petition for the extension of a patent, witnesses are called and sworn as before the Courts of law. Where it appears that the Court below has not made sufficient inquiry into the facts, the hearing of the appeal may be directed to stand over until the Court below has completed its inquiry, and (if necessary) altered or supplemented its judgment in accordance with the facts. The committee may refer any matter to be examined and reported on by the registrar, or by some other person specially appointed. In some old cases, the committee took the opinion of foreign jurists on questions of law; but it is not likely that these precedents will be relied on or followed at the present day.

When the argument is concluded, their lordships proceed, either at once or after an interval of time, to deliver their judgment, *i.e.* to state the reasons for which they will advise Her Majesty to allow or dismiss the appeal. It is not now customary to give any information as to the concurrence or dissent of individual members of the Board; there is only one



judgment, delivered by one member on behalf of the committee. In the formal report to Her Majesty, after reciting the substance of the petition of appeal, their lordships humbly report as their opinion that the judgment appealed from ought to be affirmed, reversed, or varied, and that the appeal ought to be dismissed or allowed. When the decree of the Court below is substantially varied, the appeal is allowed; but in affirming a decree, their lordships may make amendments in point of form for the sake of greater clearness. When accounts are to be taken, or further inquiries made, the case is remitted to the Court below, with a declaration of the rights of the parties. The report concludes by stating that if Her Majesty in Council is pleased to approve of what is therein recommended, their lordships direct that the costs of the appeal are to be dealt with as they may indicate. As a general rule, the direction is that the costs are to be paid by the unsuccessful party; but where, for example, a successful appellant is to blame, the direction will be that the parties do bear their own costs. If no direction were given as to costs, the effect would probably be to give the successful party a right to his costs. See as to successful appellants, the Order in Council of 13th June 1853.

When judgment has been delivered, the registrar prepares a draft Order in Council, embodying the formal report of the committee. It is not now the practice to require the parties to submit minutes of the Order to be made; but in cases of difficulty the draft Order is communicated to the agents on both sides, and any suggestions made by counsel are considered by the registrar, or, if necessary, by the committee. When the draft Order has been approved by Her Majesty in Council, it is binding on the parties, and on the judicial or executive officers to whom it is addressed. A party may apply by petition addressed to Her Majesty in Council, to have the final Order on an appeal varied or rescinded, but such applications are permitted only for the correction of mistakes, and the petition will be dismissed if it appears that what is asked for is really a re-hearing of the case. Where the Court below has made a mistake in carrying out the Queen's Order, a supplemental appeal may be permitted (see *Rodger v. Comptoir d'Escompte de Paris*, 1869, 7 Moo. P. C., N. S. 314; L. R. 2 P. C. 393).

It is usual to insert in the Queen's Order the exact sum which the unsuccessful party is to pay to the other party for his costs of the appeal incurred in England. As soon as judgment has been delivered, a committee order is issued directing that the costs of the successful party are to be taxed by the registrar, and an appointment is made for that purpose, due notice being given to both sides. Where the taxation proceeds as between party and party, the costs allowed will be the costs reasonably incurred in placing the party's case before the committee; fees to counsel, for example, are allowed at the amount usually paid in the Privy Council; if an agent is instructed to pay a special fee to secure the attendance of distinguished counsel, the charge will be allowed as between solicitor and client, but disallowed in part as between party and party. The charges for printing, and for the necessary attendances, etc., are allowed in accordance with the Schedule of Fees as sanctioned by the Orders in Council. A party may obtain an order for the taxation of his own costs as between solicitor and client. A party who changes his agent must pay the costs of his former agent, as between solicitor and client, before the name of the new agent is entered on the record. The rules of taxation observed in the Privy Council have not been reduced to a systematic form; and the precedents which have found their way into books of practice are not always to be relied on. Full



information on any doubtful point may be obtained from the clerks in the Judicial Department of the Council Office. In ecclesiastical cases, the costs are taxed by the Registrar of Her Majesty in Ecclesiastical Cases. A party who is dissatisfied with the decision of the registrar may petition the committee to review the taxation; but it appears that no such petition has been presented within the memory of any of the existing officials.

[*Authorities.*—Works cited in the foregoing article, and Privy Council Reports of Acton, Knapp, Moore, etc.]

**Privy Purse.**—The Privy Purse is the amount set apart in the Civil List (see LIST, CIVIL) for the private and personal use of the sovereign. Under the present arrangement it is £60,000 per annum.

By the Private Property of Sovereign Act, 1800 (39 & 40 Geo. III. c. 88), s. 1, it is provided that lands theretofore purchased by the sovereign, or thereafter to be purchased by him, his heirs, or successors, out of any moneys issued and applied for the use of his or their privy purse should belong to him.

By sec. 10 of that Act it is also provided (*inter alia*) that personal estate consisting of money issued or applied for the use of the privy purse should be subject to disposition by will in writing, and liable to all debts payable out of the privy purse. See SOVEREIGN.

**Privy Seal and Privy Signet.**—As to the Privy Seal, see LORD PRIVY SEAL.

The Signet, or Privy Signet, is the principal of the three seals (the others being a lesser seal, and a small seal called the *cachet*), which are delivered to each of the Secretaries of State on their appointment, and by the delivery of which they are appointed to their offices. It is engraved with the Royal Arms with supporters, the others only being engraved with the Arms.

The Secretaries of State, as the officials through whom communications on public business take place between the sovereign and subject, are historically connected with the king's clerk, or secretary, who appears first as an officer of that name in the reign of Henry III., separate from the Chancellor and the clerks of his staff. He was appointed by the delivery of the Signet, and he had an office called the Signet Office, with a number of persons holding the office of Clerks of the Signet. Through this office all Acts of State which required the Signet passed; but the business had come to be managed by the Home Office, and the clerks were abolished in 1851 (14 & 15 Vict. c. 82).

The use of the Signet as part of the preliminaries to the passing of grants under the Great Seal was rendered unnecessary by the same Act. See LORD PRIVY SEAL.

It is used in the Foreign Office upon instruments which authorise the Great Seal to be affixed to powers to treat, and ratifications of treaties pass under the signet as well as the sign manual, and are countersigned by the Secretary of State. In the Colonial Office it is affixed to commissions and instructions. In the Home Office and War Office it is not used.

[*Authority.*—Anson, *Law and Custom of the Constitution.*]

**Privy Tithes.**—See TITHES.



**Prize Fight.**—A fight between two men with ungloved hands for money, where the object of the contest is to subdue each other by blows, is an unlawful assault (*R. v. Coney*, 1882, 8 Q. B. D. 534).

Persons who attend such a fight are guilty of unlawful assembly (*R. v. Billingham*, 1820, 2 Car. & P. 234), and persons who are present to aid and abet a fight, otherwise than as mere spectators, are liable for the assault (*R. v. Coney, ubi supra*). The somewhat narrow distinctions between prize fights and sparring or boxing contests are discussed under BOXING MATCH; and see DUEL.

**Prize (or Prize of War)**—Property captured at sea by a belligerent. As to captures on land, see BOOTY OF WAR.

*Prize Courts.*—In most countries tribunals are specially created *ad hoc* on the outbreak of war to adjudicate upon captures.

Similarly, it was usual in Great Britain on the outbreak of war to enact the necessary provisions concerning naval prize.

The whole subject is now dealt with by 27 & 28 Vict. c. 25, known as the Naval Prize Act, 1864, which also contains provisions respecting the competent Courts.

“Prize Courts,” observes Sir H. Maine, “are sometimes called International Courts, and no doubt modern international law does to some extent recognise them; but in principle a Prize Court is a Court established by a positive municipal law, and it is intrusted by the sovereign of the State in which it is established with the duty of deciding whether ship or cargo is prize or no prize. In the abstract, its object is to satisfy the conscience of the sovereign that the captures made by his subjects are valid captures. He is always, in theory, supposed to be responsible for them”

(*Int. Law*, p. 96).

Under the Naval Prize Act, 1864, the High Court of Admiralty (*i.e.* by the Judicature Act, 1873, the High Court of Justice) and every Court of Admiralty or Vice-Admiralty or other Court exercising Admiralty jurisdiction in Her Majesty's dominions, “for the time being authorised to take cognisance of and judicially proceed in matters of prize,” is a Prize Court (s. 3).

Appeal lies to the Judicial Committee of the Privy Council (s. 5).

*Procedure.*—See the Naval Prize Act as to forms and procedure, fees, costs, charges, and expenses (ss. 13, 53, and 54); as to limit of time for appeal (s. 8); as to persons claiming an interest in the capture, and as to security for costs to be given by the claimant (s. 23); as to appraisement and power of Court to order sale (ss. 26 and 27). All these provisions apply not only to ships, but also *mutatis mutandis* to goods taken as prize on board ship, and the Court may direct such goods to be unladen, inventoried, and warehoused (s. 31).

*Vessels liable to detention.*—The following vessels are liable in time of war to detention by British war vessels:—

1. Any enemy vessel, irrespectively of her destination or cargo.
2. Any British vessel or vessel of an ally, trading with or acting in the service of the enemy.
3. Any neutral vessel engaged in—
  - (a) Carriage of contraband;
  - (b) Acting in the service of the enemy;
  - (c) Breach of blockade.
4. Any vessel of whatever nationality—
  - (a) Resisting visit and search;
  - (b) Sailing under neutral convoy which resists;



- (c) Sailing under enemy convoy ;
- (d) Deficient in ship's papers.

(Holland, *Manual of Naval Prize Law*, art. 9.)

*Duties of Commanders on Capture to secure Evidence.*—"The first duty," says Prof. Holland's *Manual*, "of commanders of vessels in Her Majesty's service is to secure all the papers belonging to the vessel, as well as those which are usually denominated 'ship papers,' and which relate only to the vessel and cargo, as all other papers of whatever description which may be either delivered up or found on board."

The vessel's papers, the *Manual* adds, as soon as secured should be arranged and numbered in consecutive order, care being taken that the enclosures are not separated from their envelopes. The importance of securing all the vessel's papers is manifest, inasmuch as the evidence to acquit or condemn the prize must, in the first instance, come solely from the prize herself, namely, from the papers on board and from the depositions on oath of the principal persons belonging to the prize (art. 240).

Moreover, immediately upon going on board the prize officer should draw up an inventory of the stores, furniture, and cargo of the vessel, so far as can be ascertained without disturbing the stowage. He should invite the master to assist him in drawing up this inventory, and should in all cases deliver a copy thereof signed by himself to the master (*Manual*, art. 305).

Lastly—

The captain of the capturing or detaining ship shall cause the principal officers of the vessel detained, and such other persons of the crew as he shall think fit, to be examined as witnesses in the Prize Court to prove to whom the vessel and cargo belong ; and he shall send to the Court all passports, custom-house clearances, log-books, and all other ship's papers which shall be found on board, without suffering them to be on any pretence secreted or withheld

(*Manual*, art. 248).

*Powers of Prize Court.*—The powers of the Prize Court are to condemn as lawful prize captures properly made ; to order the restoration of property wrongfully captured, and award damages against the captor ; and to inflict punishment in the special cases provided for (see *infra*).

*Conjunct Capture with Ally.*—Jurisdiction is also given to a Prize Court by the Naval Prize Act, 1864, as to ships or goods taken by naval or naval and military forces while acting in conjunction with allied forces, and upon condemnation to apportion the due share of the proceeds to the allied Power (Naval Prize Act, s. 35).

*Joint Captures* are provided for under sec. 36 of the same Act, and for *Land Expeditions*, see sec. 34 of the Naval Prize Act.

*Recapture.*—It is the duty of a commander, if possible, to rescue any British vessel which he may find attacked or captured by the enemy.

If he succeed in effecting the rescue of such a vessel, he may either at once send her in for adjudication, or, at his option, unless she shall have been already carried into an enemy's port, or set forth or used by the enemy as a ship of war, allow her to prosecute her voyage and unlade and dispose of her cargo.

Upon adjudication the Prize Court will order the vessel and cargo to be restored to their respective owners upon payment by them of prize salvage (Holland, *Manual*, arts. 261–263).

The prize salvage which will be awarded to the recaptors for the recapture of any British vessel before she has been actually carried into an enemy's port, is one-eighth part of the value of the prize ; or, in case the recapture has been made under circumstances of special difficulty or danger, a



sum not exceeding one-fourth part of the value (Naval Prize Act, 1864, s. 40).

If a commander recapture from the enemy a neutral vessel, which would not have been liable to condemnation in the Prize Court of the enemy, he is not entitled to salvage; and should, without delay and without taking ransom, set her free to prosecute her voyage (*War Onskan*, 2 Rob. C. 299; see *Manual*, art. 270).

*Prize Bounty*.—Part V. of the Naval Prize Act deals with prize bounty, the principal provision on which is as follows:—

If in relation to any war Her Majesty is pleased to declare by proclamation or Order in Council her intention to grant prize bounty to the officers and crews of her ships of war, then such of the officers and crews of any of Her Majesty's ships of war as are actually present at the taking or destroying of any armed ship of any of Her Majesty's enemies shall be entitled to have distributed among them as prize bounty a sum calculated at the rate of £5 for each person on board the enemy's ship at the beginning of the engagement (s. 42).

*Ransom*.—The same Act also gives power to the Queen, by Order in Council (s. 45), to prohibit, regulate, or allow the ransom of British ships taken as prize by the enemy.

*Offences against Prize Law*.—On proof of any offence against the Law of Nations, or against any Act relating to naval discipline, or against any Order in Council or Royal Proclamation, or of any breach of instructions relating to prize, or any act of disobedience to the orders of the Lords of the Admiralty, or to the command of a superior officer, committed by the captors in relation to their prize, or in relation to any person on board thereof, the Court may on condemnation reserve the prize to Her Majesty's disposal, notwithstanding any grant that may have been made in the captors' favour.

Sec. 14 of the Foreign Enlistment Act, 1870 (33 & 34 Vict. c. 90), also provides for the restoration of illegal prize brought into British ports:—

If during the continuance of any war in which Her Majesty may be neutral, any ship, goods, or merchandise captured as prize of war within the territorial jurisdiction of Her Majesty, in violation of the neutrality of this realm, or captured by any ship which may have been built, equipped, commissioned or despatched, or the force of which may have been augmented contrary to the provisions of this Act, are brought within the limits of Her Majesty's dominions by the captor or any agent of the captor, or by any person having come into possession thereof, with knowledge that the same was prize of war so captured as aforesaid, it shall be lawful for the original owner of such prize, or his agent, or for any person authorised in that behalf by the Government of the foreign State to which such owner belongs, to make application to the Court of Admiralty for seizure and detention of such prize, and the Court shall on due proof of the facts order such prize to be restored.

Sec. 46 of the Naval Prize Act also provides for the punishment of the masters of merchant vessels sailing under the convoy of British warships who disobey any signal, instruction, or command of the commander of the convoy, or who, without leave, desert the convoy. Such an offence is punishable with imprisonment for one year, together with a fine not exceeding £500.

*Limitation of actions*, see sec. 51.

*Resistance by Non-Commissioned Vessels*.—"Non-commissioned vessels," says Mr. Hall, "have a right to resist when summoned to surrender to public ships or privateers of the enemy. The crews, therefore, which make such resistance have belligerent privileges; and it is a natural consequence of the legitimacy of their acts that if they succeed in capturing their



assailant the capture is a good one for the purpose of changing the ownership of the property taken and of making the enemy prisoners of war." By some writers it is asserted that a non-commissioned ship has also a right to attack. "If there was ever anything to be said for this view, and the weight of practice and of legal authority was always against it, there can be no question that it is too much opposed to the whole bent of modern ideas to be now open to argument" (*Int. Law*, p. 550).

In any case prizes taken by ships other than ships of war upon condemnation become droits of Admiralty (Naval Prize Act, s. 39). See ADMIRALTY, THE, vol. i. p. 147.

*Pre-emption*.—Sec. 38 of the Naval Prize Act provides for the purchase by the Admiralty for the public service of stores on board foreign ships (see PRE-EMPTION, INTERNATIONAL).

[*Authorities*.—Holland, *A Manual of Naval Prize Law* (issued by authority), Lond. 1888; *The Queen's Regulations and Admiralty Instructions*, 1893; Capt. Johnstone, "Naval Prize in War" (*United Service Magazine*, 1891); Hall, *International Law*, 4th ed., Oxford, 1895; Wildman, *The Law of Search, Capture, and Prize*, Lond. 1854; Hazlitt and Roche, *Manual of the Law of Maritime Warfare*, Lond. 1854; De Burgh, *The Elements of Maritime International Law*, Lond. 1868; Calvo, *Le Droit International theorique et pratique*, vols. iv. and v., Paris, 1888; Phillimore, *Commentaries upon International Law*, vol. iii., 3rd ed., Lond. 1879–1889; Twiss, *The Law of Nations in Time of War*, 2nd ed., Lond. 1875, and *Belligerent Right on the High Seas*, Lond. 1884.]

## Probate.

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### 1. INTRODUCTION.

The term "probate" in its strictest sense signifies the copy of the will which is given to the executor, together with a certificate granted under seal of the Court, and signed by one of the registrars, certifying that the will has been proved. This probate or copy of the will constitutes the executor's title to act, the original document being left in the registry. When the two documents differ, and questions of interpretation arise in Chancery, the Court may look at the original will (see *Havergal v. Harrison*, 1843, 7 Beav. 49; *Turner v. Hellard*, 1884, 30 Ch. D. p. 390), at any rate if there are special circumstances (*Gann v. Gregory*, 1854, 3 De G., M. & G. p. 777), or may give opportunities for the correction of the probate (*Taylor v. Creagh*, 1857, 8 Ir. Ch. p. 281). In a wider sense the word indicates the process and results of proving a will; and generally the word is used even more freely to denote all matters which come within the purview of the Probate Court. The business of that Court is to secure the proper appointment of the personal—and since 1897 of the real—representatives, *i.e.* of the executor, to carry out the wishes of the testator if there be



a will; or of an administrator to distribute the estate according to law if there be an intestacy; and generally to decide all questions as to wills and grants of administration.

For historical reasons, English law has never been capable of the simplicity of Roman law, which made a man's estate devolve in one mass.

In the twelfth century the system of primogeniture was established for the descent of land, such descent being regulated by the common law. From that time till 32 Hen. VIII. c. 1, the heir must succeed to the lands, and no devise of that is possible. In the case of chattels, the Church stepped in, wishing to protect gifts at death to pious uses. The common lawyers allowed the Church Courts exclusive jurisdiction, provided always there were no testamentary gifts of land. The will of chattels and the executor make their appearance together. The executor is common to most parts of Western Europe, but nowhere is of such importance as in England, where he is the favoured creature of the Ecclesiastical Courts, as opposed to the common law heir (Pollock and Maitland, *History of English Law*, vol. ii. p. 312; art. EXECUTORS AND ADMINISTRATORS). Probate, as we now understand it, that is to say, some process for establishing the validity of a man's will, naturally does not appear until some time after the Church had made good its claim to exclusive jurisdiction in testamentary causes. Selden (*Eccl. Juris. of Testaments*) states there is no instance of such granting of probate earlier than Henry III. The proper ecclesiastical functionary to grant probate in this way was the bishop in whose diocese the goods of the dead man lay. A difficulty arose if the deceased had property in two dioceses, a compromise being eventually arrived at that, if he possessed *bona notabilia*, i.e. goods over the value of £5, in two dioceses, neither bishop should grant probate, but only the prerogative Court of the archbishop. The executor soon becomes recognised in the temporal Courts, and he takes his place as the personal representative at common law (art. EXECUTORS AND ADMINISTRATORS).

At first the testator had not full right of disposition, even of personalty; and in the North he did not acquire this full power until 1692, though this had long been the rule in the province of Canterbury. Now, by the Wills Act (1 Vict. c. 26) full power of disposition over all property, real and personal, is secured to all persons of full age (s. 3).

Administration on intestacy appears somewhat later than the will. The Church used all her influence to secure the making of a will, and the assignment to her of a portion on behalf of the poor; to die intestate in the thirteenth century was to die unconfessed. But if the deceased left no will the next best thing was that the Church should dispose of his property for the good of his soul (Constitution of Othobo, 1268); the original charter of 1215 contained a proviso to this effect, respect being had to the rights of kinsfolk and creditors. Bracton mentions the claims of friends in the same breath with that of the Church, and no doubt their claims usually were respected. In 1285 (Stat. Westm. 2, c. 19) it was declared the ordinary should be bound to pay the debts of the intestate, just as the executors were; and an early instance of letters of administration occurs in 1313, where the Bishop of Durham intrusts the goods of the intestate to the widow and two friends. In 1357 Stat. 31 Edw. III. c. 11 made this appointment of administrators the rule: such to be the "next and most lawful friends of the dead person." Actions for debt were given both to and against these administrators, but they were still to "dispend" the goods for the soul of the dead. For the subsequent history of the rights of succession on intestacy, see *Carter v. Crawley*, 1681, Ray. T. p. 496. The Statute of Dis-



tributions (22 & 23 Car. II. c. 10) eventually provided for the distribution of residue after payment of debts amongst the wife, children, and next of kindred.

## 2. THE COURT.

All this probate work or supervision of the appointment of personal representatives remained in the hands of the ecclesiastical authorities till 1857, when it was entirely transferred by the Court of Probate Act (20 & 21 Vict. c. 77) to a specially constituted Probate Court; by sec. 4 of that Act "the voluntary and contentious jurisdiction and authority in relation to the granting or revoking probate of wills and letters of administration of the effects of deceased persons . . . shall, except as hereinafter is mentioned, be exercised . . . in a Court to be called the Court of Probate." The exception alluded to refers to suits for legacies and distribution of residues; these had been entertained by the old Ecclesiastical Courts, but were expressly reserved by sec. 23 of the Act, and would now be dealt with in Chancery. Sec. 23 further provided that the new Court should have the same powers, and its grants and orders should have the same effect throughout all England as the grants and orders of the Prerogative Court of the Archbishop of Canterbury then had.

(i.) *The Probate, Divorce, and Admiralty Division*.—The Probate Court maintained its separate existence till 1875, when, by the coming into operation of the Supreme Court of Judicature Act, 1873 (36 & 37 Vict. c. 66), the Probate Court as such was abolished, and became part of the Supreme Court of Judicature (s. 3), which is divided into the Court of Appeal and the High Court of Justice. The High Court of Justice is declared to be a superior Court of record, and amongst other jurisdictions that of the Court of Probate is transferred to it (s. 16). The High Court of Justice was divided into five, now three, Divisions, the Probate, Divorce, and Admiralty forming one. All causes and matters pending in the Court of Probate, and all causes and matters which, if the Act had not been passed, would have been within the exclusive cognisance of the Court of Probate, were assigned to the Probate Division (s. 34). The judges of the Probate, Divorce, and Admiralty Division were to be two in number (s. 31, subs. 5); but causes were to be heard before one judge only (s. 42).

(ii.) *Registrars*.—By the 14th section of the Act of 1857 there were to be three registrars, various record keepers, and other minor officials, and a district registrar for each district registry in England and Wales. The powers of the district registrar are (1) to grant probate or letters of administration in common form, if it appears on affidavit that the deceased had a fixed place of abode within the district (s. 46); (2) where there is any dispute, the district registrar may not grant probate or administrations till after the contention is disposed of "by decree or otherwise," when the grant would go through in the ordinary form (s. 48). The ordinary jurisdiction of the principal registry extends to the city of London, the counties of Middlesex, Surrey, Hertfordshire, and parts of Kent and Essex, and includes cases arising in connection with deaths abroad. Application may, however, be made in all cases direct to the principal registry at the option of the applicant, and there is no obligation to proceed in the district registry or County Court (s. 59; see also 21 & 22 Vict. c. 95, s. 20).

(iii.) *County Court*.—In contentious matters where the personal property of the deceased is under £200 (not deducting debts), or if realty is under £300 (not deducting mortgages, see *Davis v. Brecknell*, 1870, 2 P. & D. 177), the judge of the County Court having jurisdiction in the place where the



deceased had at the time of his death a fixed abode has power to grant and revoke probate and administrations (Probate Act, 1858, s. 10; Probate Act, 1857, ss. 55, 56, and 57); even where the property is below the limit, however, application may be made direct to the High Court, the judge having power to remit if he pleases. When the County Court has heard the case and made a decree, the registrar of the County Court transmits the papers to the proper district registrar, and thereon probate or administration issues out of the district registry (Probate Act, 1857, s. 55). The probate rules (contentious business) are binding on the County Court judge (*Leigh v. Green*, [1892] Prob. 17).

(iv.) *Appeals*.—Appeals lie from the County Court to the Probate Division sitting as a divisional Court (R. S. C. Order 59, r. 4). From the Probate Division itself appeals lie in the ordinary way, and subject to the ordinary rules, to the Court of Appeal and the House of Lords (R. S. C. Order 58, and Appellate Jurisdiction Act, 1876).

(v.) *Rules*.—Besides the natural division into proof of wills and administration, probate work is either contentious, or else non-contentious or common form. Sec. 2 of the Act of 1857 defined the common form business to mean “the business of obtaining probate and administration where there is no contention as to the right thereto, including the passing of probates and administration through the Court of Probate in contentious cases when the contest is terminated, and all business of a non-contentious nature to be taken in the Court in matters of testacy and intestacy, not being proceedings in any suit, and also business of lodging caveats against the grant of probate or administration.” Much of the ordinary work of the division comes under this head. All other business is contentious, *e.g.* where a will is disputed or a contest arises as to who is entitled to letters of administration.

By the Court of Probate Act in 1857, the practice of the new Court was, except where otherwise provided by the Act, or by rules or orders to be from time to time made under the Act, to be, so far as the circumstances of the case would permit, according to the practice in the Prerogative Court (s. 29), meaning thereby the Prerogative Court of Canterbury; and power was given to make rules (s. 30). By the Judicature Act, 1875 (38 & 39 Vict. c. 77), “all rules and orders of Court in force at the time of the commencement of this Act (*i.e.* 1st November 1875) in the Court of Probate, except in so far as they are expressly varied by the schedule hereto or by rules of Court made by Order in Council before the commencement of this Act, shall remain and be in force in the High Court of Justice and in the Court of Appeal respectively until they shall respectively be altered or annulled by any rules of Court made after the commencement of this Act” (s. 18). The Judicature Acts of 1873 (s. 23) and of 1875 (s. 21) both contain general provisions that, apart from any special provisions of the Acts themselves, or any special rules made thereunder, the transferred jurisdiction should be exercised by the High Court as nearly as may be in the same manner as the same might have been exercised in the old Courts, and, save as above, the older “forms and methods of procedure” are retained. The rules now in force for the Probate Division are—(a) Non-contentious business—(i.) Rules and Orders of 1862, 1865, 1871, made in pursuance of the Probate Act of 1857; (ii.) Rules and Orders of 1882, 1887, and 1892, made in pursuance of the Probate Act of 1857 and of the Judicature Act of 1875, together with various tables of fees published from time to time. The rules in existence for non-contentious business before the passing of the Judicature Act still govern the procedure of the Court,



that Act not having affected the non-contentious practice (*Goods of Tomlinson*, 1881, 6 P. D. 209). (b) Contentious business—Rules and Orders of 1862, made in pursuance of the Probate Acts of 1857 and 1858. The Judicature Act has very seriously affected the contentious practice of the Court. The old probate suit has now become a probate action, and the rules of 1862 are only applicable in so far as they are not repugnant to the Judicature Acts, or to the Rules of the Supreme Court made thereunder.

### 3. JURISDICTION.

The English Court will not assume jurisdiction to grant either probate or administration in every case.

(a) *As to property*, the subject-matter of the Court's jurisdiction is—

(i.) Personalty situate in England or in transit to this country at the time of death (*Evans v. Burrell*, 1859, 4 Sw. & Tr. 186). "It is a condition precedent to a grant that it should appear that the deceased left property in this country, either real or personal" (Walker and Elgood, 3rd ed., p. 33), and that irrespective of the question of domicile (Dicey, *Conflict of Laws*, p. 316; *contra*, Powles and Oakley, 3rd ed., p. 183). And under 27 & 28 Vict. c. 56, s. 4, a ship or share of a ship registered at a port in the United Kingdom is to be taken as part of such personalty, though the vessel may be at sea at the owner's death. So a will limited to the disposal of property in a foreign country will not be entitled to probate here (*Goods of Coode*, 1867, L. R. 1 P. & D. p. 449); and if the testator expressly restricted the application of his will to property abroad, then there will be an intestacy as to property here, and a grant of administration must issue (*Goods of Mann*, [1891] Prob. p. 293). The English will may refer to a foreign one, and the Court will incorporate the latter in the English probate if necessary (*Goods of Harris*, 1870, L. R. 2 P. & D. p. 83); but so long as there is no connection between them, the Court will usually refuse to grant probate of the foreign will (*Goods of Murray*, [1896] Prob. 65, and cases there cited).

So letters of administration will not issue if the deceased left no personal property situate within the jurisdiction of the Court.

Conversely the grant of probate or administration in the English Court has no direct operation abroad. "It must not be understood that when a testator dies domiciled in England leaving assets abroad, the grant of probate here (or of letters of administration) can extend to them. For the probate (or letters of administration) were never granted except for goods which at the time of death were within the jurisdiction of the ordinary, who made the grant" (Williams on *Executors*, 9th ed., p. 300; Dicey, *Conflict of Laws*, p. 345).

An English administrator or executor may, however, sue in this country for foreign assets (*Whyte v. Rose*, 1842, 3 Q. B. 493), and the foreign Courts will usually recognise the status of the English representative on application.

Special provision has been made by the Legislature for the recognition of an English grant in Scotland (21 & 22 Vict. c. 56, s. 14) and Ireland (20 & 21 Vict. c. 79, s. 94), and in the United Kingdom of grants made in the colonies (55 Vict. c. 6).

(ii.) *Real property*, also situate in England. Up till 1897 the Court had no jurisdiction to grant probate of a will which referred only to realty, though the fact that the will affected to dispose of some realty would not prevent the grant going if there was personalty devised as well. Where a mixed will of this nature is disputed, the heir and persons interested in the realty must be cited (Probate Act, 1857, s. 61).

Similarly, a grant of administration could not pass realty; chattels real,



however, go to the personal representative under the old law, and mortgages and trust estates also, since 1881 (Conv. Act, 1881, s. 30).

Even if a will purported to pass no personalty, it was always sufficient to give the Court jurisdiction if the will appointed a personal representative, and that even though the executor renounced (*Goods of Jordan*, 1867, L. R. 1 P. & D. 555). Now by Part I. of the Land Transfer Act, 1897, real estate devolves on the personal representative as if it were a chattel real (s. 1 (1)); and "probate and letters of administration may be granted in respect of real estate only, although there is no personal estate" (s. 1 (3)). Real estate does not include land of copyhold or customary tenure; and the Act is not retrospective. Apparently the Act does not allow a separate real representative to be appointed, but clothes the old personal representative with full rights as to realty. Grants never extended to foreign realty under the old law, and the Act makes no alteration in this respect.

(iii.) Certain property is specially exempt from the jurisdiction of the Court by statute, so that no grant of probate or administration thereof is necessary; *e.g.* navy money, or effects of seamen, not exceeding £100; soldiers' pension or pay, and money and effects of merchant seamen, in each case not exceeding £50; deposits in savings bank, or shares in an industrial society, not exceeding £50, together with money paid in compensation under Lord Campbell's Act (Tristram and Coote, *Probate Practice*, 12th ed., p. 23).

(b) *Person*.—Even if the deceased leaves property situate in England, but is not domiciled in this country, the English Court is not primarily the one from which a grant should be obtained; the Court of the domicile is *prima facie* the proper one to grant probate or administration (*Enohin v. Wyllie*, 1862, 10 H. L. 1); and if that Court has pronounced a decree on any question of succession or administration, the English Court will follow its decision (*Doglioni v. Crispin*, 1866, L. R. 1 H. L. 301; *In re Trufort*, 1887, 36 Ch. D. 600).

The foreign grant, however, will not of its own force vest in the representative appointed by the foreign Court, property situate in England; "for the Courts here will not recognise any will of personalty except such as the Court of Probate in this country has by the probate adjudged to be the last will" (Williams on *Executors*, 9th ed., p. 296; *Price v. Dewhurst*, 1838, 4 Myl. & Cr. 76); and the foreign administrator must obtain an ancillary grant here in order to sue or lawfully obtain possession of assets.

At the same time the English Court will usually act ministerially and adopt the representative selected by the foreign Court (*In re Hill*, 1870, L. R. 2 P. & M. 90); but the grant may be in a different form to the foreign one, *e.g.* administration with will annexed instead of grant to executor according to tenor (*In re Cosnahan*, 1866, L. R. 1 P. & M. 183). Where there are no proceedings, however, pending in the Court of the domicile, the grant will be general in character, and not limited to assets here (*Orr-Ewing's case*, 1883, 9 App. Cas. 34). If the case comes into the English Court, that Court will apply the law of the domicile to decide the following questions:—(1) The validity or otherwise of the will; (2) the construction of the will; (3) the right of succession (*Hog v. Lashley*, 1792, 3 Hag. Ec. 415). The grants made by the Court are mainly of three kinds: grants of probate or proof of a will; grants of letters of administration with the will annexed; and simple grants of administration.

#### 4. PROBATE.

The will must comply with the requirements of English law, or the Court cannot grant probate. The will must be (i.) in the *form* required by



the Wills Act (1 Vict. c. 26), signed that is at the end by the testator (15 Vict. c. 24, s. 1), in the presence of two witnesses, who must also sign in the testator's presence and in the presence of one another (Powles and Oakley, ch. vii.); it will be sufficient if the testator acknowledge his signature in the presence of the witnesses who thereupon sign, provided they see the testator's signature already affixed (*Daintree v. Fasulo*, 1888, 13 P. D. 67).

Soldiers on actual service, and seamen, whether merchant or otherwise, when actually at sea, can, however, make their wills without restriction as to form: these privileged wills may be in writing but without witnesses, or oral; and may be made by a minor (Tristram and Coote, 12th ed., p. 407).

Where the deceased makes his will abroad, the general rule of international law is that it must be in the form required by the law of the testator's domicile at the time of making (*Price v. Dewhurst*, 1838, 4 Myl. & Cr. 76). As to British subjects, however, 24 & 25 Vict. c. 114 provides that after 1861 the will shall be good in form if (1) when made abroad it is good according to the forms required either by *lex loci* or by *lex domicilii* of testator at the time, or by the *lex domicilii originis* of the testator if that be within Her Majesty's dominions (s. 1); (2) if, when made in the United Kingdom, it satisfies the *lex loci*, whatever the testator's domicile (s. 2). And if the will has once been valid, changes of domicile shall not invalidate it (s. 3; see *Stokes v. Stokes*, 1898, 67 L. J. p. 55).

The Naturalisation Act putting aliens on the same footing as British subjects for the purposes of holding and disposing of property (s. 2) does not extend to aliens the privilege of 24 & 25 Vict. c. 114 (*Goods of Buseck*, 1881, 6 P. D. 211; *Bloxam v. Favre*, 1883, 8 P. D. 101).

(ii.) The testator must have had testamentary capacity; infants cannot make a will (Wills Act, s. 7); nor can lunatics, save during a lucid interval. The fact that the testator was subject to delusions will not invalidate the will if his mind was clear on the material points (*Boughton v. Knight*, 1873, L. R. 3 P. & D. 64; *Banks v. Goodfellow*, 1870, L. R. 5 Q. B. 549). See article LUNACY, vol. viii. at p. 50. So habitual drunkards are incapable of making a will when in drink (see, generally, Williams on *Executors*, p. 9; Powles and Oakley, ch. iv. As to wills of married women, see Powles and Oakley, ch. vi.).

(iii.) The testator must have known and approved of the contents of the will; if words have been introduced by inadvertence and without the testator's consent, the Court will not grant probate of them (*Morell v. Morell*, 1882, 7 P. D. 68).

(iv.) Finally, the testator must have been acting as a free agent, and not under stress of fraud or undue influence. "The influence to vitiate an act must amount to force and coercion. It must not be the influence of affection and attachment" (Williams on *Executors*, 9th ed., p. 40; *Parfitt v. Lawless*, 1872, L. R. 2 P. & D. 462; *Wingrove v. Wingrove*, 1886, 11 P. D. 81). See on whole subject, UNDUE INFLUENCE; INCORPORATION OF DOCUMENTS.

Grants of probate are of two kinds, in common form and in solemn form.

(i.) In *common form*. This will be made (a) to the executor directly appointed by the will; (b) if none is directly named executor, but executor's functions, e.g. payment of debts, are given to any person, he will be executor according to the tenor (*Goods of Punchard*, 1872, L. R. 2 P. & D. p. 369, and cases there cited). A man may also be executor *de son tort* by intermeddling, though not appointed by the will or by the Court (Williams on *Executors*, 9th ed., p. 208).



An executor cannot be compelled to take unless he has intermeddled: if dilatory, he may be cited to take or refuse probate (C. P. Act, 1857, ss. 23, 25); and if he refuse to take or appear, then the rights of representation to the testator shall go as if he had not been appointed (C. P. Act, 1858, s. 16); where several executors are appointed, one may get a grant without notice to the other, and power is then reserved to the others to apply for a grant at any time. The executor's title is usually indefeasible, and he cannot be passed over by reason of bankruptcy, insolvency, felony, such even as an admitted tampering with the will (*Goods of Mary Hett*, 1843, 6 Jur. 350), or general bad character (*Goods of Samson*, 1873, L. R. 3 P. & D. 48). He may, however, be excluded from probate on the grounds of lunacy (*Evans v. Tyler*, 1849, 2 Rob. Eccl. 131). The title of the executor depends on the will, and he must get it confirmed or proved; to this end he must make two separate oaths or affirmations—(a) the oath of office, that he will duly administer the estate; (b) the oath for inland revenue.

The oath of office mentions the date on which the testator died, and if this cannot be stated accurately, the registrars must be satisfied as to the reason; they may also require proof as to identity of the executor. The oath refers to the will, which is annexed, and which must be marked by the executor (N. C. B. Rules, 1862, rr. 47, 48, 49). Application cannot be made till seven days have elapsed from testator's death, save by leave of Court. Applications after three years from the death will require explanation (rr. 43, 45). The oath as to property is for the use of the Commissioner of Inland Revenue (43 Vict. c. 14, s. 10; 44 Vict. c. 12, sec. 26; and see DEATH DUTIES). In the case of testator's death since 1894, the executor is required to state in accounts annexed to the affidavit all the property in respect of which estate duty, as defined by the Act, is payable (s. 8 (3)).

The grant when obtained will confer the right to administer all the testator's estate situate in England, personal and real; the latter includes all real estate vested in any person, without a right in any other person to take by survivorship save land of copyhold tenure, or customary freehold, where any act by the lord is necessary to perfect the title of a purchaser (60 & 61 Vict. c. 65, s. 1); but no power to administer estate situate elsewhere. If the testator, however, left property in Ireland or Scotland as well as in England, the probate can be made to apply to all property within the United Kingdom (21 & 22 Vict. c. 56, ss. 14, 15, 17). In such cases the value of the property in Scotland or Ireland must be separately stated in the affidavit; and the registrar must sign a memorandum that deceased died domiciled in England; this is called notation of domicile. If a will or codicil exists in duplicate, and one part is brought in for probate, the duplicate must also be produced, or its absence explained to the satisfaction of the registrar on affidavit.

The will may consist of more than one document (see INCORPORATION OF DOCUMENTS); and objections may be made in the registry to the grant on the ground of alterations or erasure.

If the attestation is imperfect, the registrars must require an affidavit from at least one of the attesting witnesses (N. C. B. r. 4); if from the affidavit of both attesting witnesses it shall appear that the requirements of the Wills Act have not been complied with, the registrars shall refuse probate (r. 5). Probate of a copy of a lost will is granted on proof that there was an original duly executed in existence since the testator's death, and that the copy is a true one. Probate in common form of a draft will only be granted where the next-of-kin consent.



(ii.) *Probate in Solemn Form*, that is, by decree after action brought in open Court, and will usually occur in two cases—(1) Where the executor is himself doubtful of the validity of the will. A writ of summons must be served on the next-of-kin, and also on the heir-at-law and other persons interested in the realty (C. P. Act, 1857, s. 61); where there is no realty, the heir-at-law need not be cited (s. 63; see also C. B. r. 78; C. B. r. 6; *Moore v. Holgate*, 1866, L. R. 1 P. & D. 101).

Probate when granted in common form is revocable. Any person whose interest is adversely affected may call it in, and put the party who obtained it to proof in solemn form (*Merryweather v. Turner*, 1844, 3 Curt. 802, 817). Payments made before the grant is revoked are valid (C. P. Act, 1857, s. 77). But the advantage of probate in solemn form is that it is irrevocable, provided all persons interested are before the Court (*Wytcherley v. Andrewes*, 1871, 2 P. & D. p. 327), unless a will of later date is subsequently discovered (*Priestman v. Thomas*, 1884, 9 P. D. 70). Executors should always prove in solemn form if there is any doubt. Material evidence may be lost if solemn proof is required later on; while the executor may have then to account for legacies, if probate is revoked, and he can only have recourse to legatees. If deceased was a bastard, the Queen's Proctor must be made a defendant. The executor propounds the will in a statement of claim, and at the hearing must call at least one attesting witness to prove due execution (*Belbin v. Skeats*, 1858, 1 Sw. & Tr. 148); and if the Court is not satisfied he must call the other witness also, even though he be hostile (*Coles v. Coles*, 1866, L. R. 1 P. & D. 70).

(2) Where the will is really disputed by the next-of-kin or others. Proceedings in such a case are usually preceded by a caveat, though caveats technically come within the non-contentious business of the Court (N. C. B. Rules, heading). The practice as to caveats follows the old rules (C. P. Act, 1857, s. 53), and is to be found in N. C. B. rr. 59–67, C. B. rr. 7–12, and district registries 72–78. The object of entering a caveat is to secure that no grant shall issue without notice to the caveator. It may be entered either in the principal or in a district registry, and remains in force six months, but may be renewed. Its effect is to stay all proceedings for a grant till it expires, or is subducted, *i.e.* withdrawn by the party who entered it, or is warned. The warning is a notice given by the registrar of the principal registry (where all warnings must be entered) to the caveator or his solicitor, "warning" him within six days after service to enter an appearance in the principal registry, and to set forth his interest. The warning may be personal or by post. If there is no appearance to the warning in seven days, the grant issues, in spite of the caveat, service of the warning, search, and non-appearance being proved by affidavit. The warning must state the interest of the person issuing it, and give an address for service within three miles of the General Post Office (C. B. rr. 11, 21; N. C. B. r. 65).

If appearance is entered, the person warning can either take out a summons to show cause why contentious proceedings should be discontinued, and grant not issued, or he may commence a probate action by issuing a writ. Contentious proceedings are now mainly governed by the Judicature Act, 1875, and the ordinary R. S. C. (but see also Judicature Act, 1875, s. 18), and are always commenced by writ of summons, and not, as formerly, by citation (Order 2, r. 1; see generally, Tristram and Coote, 12th ed., pp. 347 *et seq.*). Parties to the suit may be either those interested under the document, such as executors or legatees, or those interested in the estate, either by reason of relationship, such as next-of-kin, or from other cause, *e.g.* a creditor. Parties to probate actions are the same now as before the Judicature Act



(Judicature Act, 1875, s. 11, subs. 3). Every person having an interest must be brought before the Court, either by being made a party or by being cited to see proceedings. Generally as to parties, see R. S. C. Order 16. Where several persons have the same interest, one or more may be authorised to represent the others (r. 9). Next-of-kin are entitled to put executors to prove the will in solemn form (C. B. r. 5); and any person whose interest is affected, is entitled to intervene by obtaining leave on summons (C. B. r. 6). A creditor generally may not oppose the will (see Williams on *Executors*, 9th ed., pp. 279, 280, and cases cited), unless he has been appointed administrator; and he need not be cited. Infant defendants (under seven years) must have a guardian *ad litem*, assigned by the judge if they have no testamentary or other lawful guardian (N. C. B. Rules, 1862, r. 34); but minors (from seven to twenty-one years) may choose their own guardian, though the Court is not always bound by the choice (*Goods of Jenkins*, 1869, L. R. 1 P. & D. 690). Infants sue by their next friends (Order 16, r. 16).

Proceedings in a probate action follow generally the ordinary practice of the Queen's Bench Division under the Judicature Acts (see PLEADINGS; COSTS; DISCOVERY; EVIDENCE; APPEALS; Tristram and Coote, 12th ed., pt. 3; for administration, *pendente lite*, see below, p. 478).

There are two other forms of actions common in the Probate Division—  
(i.) Interest suits. Where the legal interest of a person in the estate of the deceased is denied; this may either be a collateral question in a testamentary suit or an original action where the right to grant of administration is disputed (C. B. rr. 61, 62). Questions of legitimacy or pedigree may be involved, or of relative fitness, *e.g.* of male or female with equal interests (*Cordeux v. Traster*, 1865, 4 Sw. & Tr. 48; *Goods of Farrand*, 1876, 1 P. D. 439), or of a majority of interests (*Goods of Hornan*, 1883, 9 P. D. 61).

(ii.) Actions for revocation of probate (when granted in common form) or of letters of administration: the grants are called in by citation, and an action for proof in solemn form or an interest suit follows.

An important provision is made by the rules for next-of-kin and others who wish to have the circumstances under which the will was executed inquired into. In all cases the party opposing the will may, with his pleading, give notice to the plaintiff that he only intends to cross-examine the witnesses produced in support of the will (C. B. 1862, r. 41; R. S. C. Order 21, r. 18). The party giving notice will then be released from the liability to pay any costs but his own, unless he alleges fraud or the proceedings are vexatious (*Beale v. Beale*, 1874, L. R. 3 P. & D. 179; *Leigh v. Green*, [1892] Prob. 17). Whether the party giving notice will get costs out of the estate depends on the ordinary rules (see COSTS).

##### 5. ADMINISTRATION WITH THE WILL ANNEXED.

This is granted where there is a will but there is no executor, because—(i.) there is no executor appointed by the will; (ii.) or the executor appointed renounces, or does not appear when cited; (iii.) the executor has died in the testator's lifetime, or after his death, without proving; if he has proved, the office will pass to his executor by the chain of executorship (EXECUTORS AND ADMINISTRATORS); if he has proved, and partially administered, but dies intestate, a grant *de bonis non administratis* with the will annexed is made; (iv.) where the Court uses its discretion under sec. 73, C. P. Act, 1857. An administrator with will annexed must give security like a simple administrator (*vide infra*); otherwise his duties and position are those of an executor (N. C. B. rr. 37, 47, 49).



In selecting the administrator, the Court will primarily prefer the person taking the largest interest under the will. This will be—(a) The residuary legatee, who “is the testator’s choice; he is the next person in his election to the executors” (*Atkinson v. Barnard*, 1815, 2 Phillim. 317); his interest being uncertain till the debts and legacies are paid, he has the largest interest in a careful administration. Where the residuary legatee survives the testator, and has a beneficial interest, his representative has the same right to administration with the will annexed as the residuary legatee himself, and is preferred to the next-of-kin; *secus*, if he be merely residuary legatee in trust (Williams on *Executors*, 9th ed., pp. 402–404; *Goods of Ditchfield*, 1870, L. R. 2 P. & D. 152). (b) In default of residuary clause or if the legatee decline, the grant will go to widow or next-of-kin under 21 Hen. VIII. c. 5, s. 3; but not to their representatives. (c) Finally, the grant may issue to creditors or legatees (Williams, *loc. cit.*; *West v. Wilby*, 1820, 3 Phillim. 381).

Sec. 73 of C. P. Act, 1857, makes provision under the following special circumstances:—

- (a) When person has died wholly intestate as to personalty;
- (b) Or leaves a will of personalty but no executor;
- (c) Or the executor at testator’s death is resident out of the United Kingdom;
- (d) And it shall appear to the Court “necessary or convenient in any such case, by reason of the insolvency of the estate of the deceased, or other special reasons,” the Court may use its discretion to appoint anyone it may think fit, other than the person by law entitled. So grants have been made to nominee of a creditor (*Goods of Brown*, 1888, 59 L. T. 523); to a legatee on bankruptcy of executor (*Goods of Cooper*, 1869, L. R. 2 P. & D. 21; and see Powles and Oakley, 3rd ed., p. 179). Generally speaking, all the rules in the Probate Division have been modified so as to admit of realty being administered conjointly with personalty under Land Transfer Act, 1897; but the Court has no jurisdiction to extend the statutory powers under this section to realty (*Goods of Roberts*, [1898] Prob. 149).

#### 6. SIMPLE ADMINISTRATION.

(i.) *General Grants*.—This is made where the deceased has died wholly intestate; disqualifications for executor apply equally to an administrator, and extend also to outlawry and bankruptcy, but not alienage. Minors are incompetent, as they cannot execute a bond. Coverture is no disqualification; but before 1882 the husband had to join in the bond; now he need not. The order of selection is prescribed by statute. 31 Edw. III. st. 1, c. 11, ordered the ordinary to “depute of the *next and most lawful friends* of the dead person intestate to administer his goods.” 21 Hen. VIII. c. 5 substituted “widow or next-of-kin, or both.” The right of the husband to rank first on the same level with the wife was recognised by 29 Car. II. c. 3, s. 25; the husband, however, will be passed over without even being cited, if guilty of cruelty or judicially separated. If the husband die without administering, the right passes to his personal representative (Williams on *Executors*, 9th ed., 349–351; *Goods of Harding*, 1872, L. R. 2 P. & D. 394). The widow will be passed over, like the widower, for adequate cause, such as adultery (*Goods of Anderson*, 1864, 3 Sw. & Tr. 489); unlike the widower, if she die before administration, the right will not pass to her representatives. If passed over, the widow will usually be cited, in accordance with the general rule that parties having prior right to a grant must generally be cited (Williams, *loc. cit.* p. 386). After widow and widower



come the next-of-kin in the following order:—children, grandchildren, and descendants in direct line, then father, mother, brothers and sisters, grandfathers and grandmothers, nephews and nieces. Where there is a contest between several next-of-kin equally entitled, the Court follows certain rules—(a) The grant will be made as desired by the majority of interests; (b) other things being equal, males will be preferred to females; (c) grant is sometimes made *priori petenti* (*Cordeux v. Trasler*, 1865, 34 L. J. P. & M. p. 128). A grant will not be made to more than three persons, and a sole is preferred to a joint grant (*Warwick v. Greville*, 1869, 1 Phillim. 123). Under the Land Transfer Act, 1897, s. 2 (4), the heir-at-law is to rank equally with the next-of-kin as entitled to grant of letters (*Goods of Barnett*, [1898] Prob. 145). The personal representative appointed by a foreign Court will usually be recognised here, though he must take out a grant (*Goods of Beg*, 1898, 67 L. J. 59).

To bastards without issue the Crown takes administration, but now retains only a percentage, allowing the residue to go to the natural relatives (Royal Warrant, 25th July 1771). Administration is granted to the Treasury Solicitor, who is constituted a corporation sole (39 & 40 Vict. c. 18, s. 1). Questions of legitimacy, save for succession to realty, are decided by the law of the domicile (*Goodman's Trusts*, 1881, 17 Ch. D. 266); to succeed to English realty legitimacy by English law is necessary (*Doe v. Vardill*, 1835, 2 Cl. & Fin. 571). *Seem*, a next-of-kin, according to law of the domicile, but illegitimate according to English law, could take a grant as to realty in England under Act of 1897, though he could not succeed to realty. The Court has finally, under sec. 73 (*vide supra*), wide powers of making grants to outsiders, provided there is no one entitled to administration. The section is most frequently utilised for making grants to creditors (*Goods of Wensley*, 1882, 7 P. D. 13; and for other cases, see Powles and Oakley, 3rd ed., p. 228).

Where there has been a limited grant originally, *e.g.* until a specified time or event is accomplished, a new grant must be made when the first is accomplished. This will be an absolute and permanent grant, following on a temporary one, and on that ground to be distinguished from a grant *de bonis non*, where a limited grant follows an absolute one. Such supplemental grants are called *cessate*, *e.g.* administration granted to a guardian of a widow during her minority; when she attains full age she takes out a full grant, and usually must give the same security as the first administrator (*Abbott v. Abbott*, 1818, 2 Phillim. 578).

(ii.) *Limited Grants*.—(1) *De bonis non*.—Where executors or administrators have obtained grants, but have not fully administered the estate, it may be necessary for the Court to appoint some one to complete the work: called a grant *de bonis non administratis*, or *de bonis non*. (i.) As to executors this will not usually be necessary, for if the executor has himself left a will and appointed an executor, then by the chain of executorship the first executor's right of administration will pass to the second, and so on. If there are several executors, and none renounce, the estate only becomes transmissible on the death of the survivor; but the rights of an executor who renounces cease entirely (C. P. Act, 1857, s. 79). Consequently it is only when the chain of executors fails that a grant *de bonis non* can be given in cases when the deceased left a will. The grant will be *de bonis non* with the will annexed for persons entitled (see above). Where an estate was administered all but one legacy, the Court granted administration with will annexed to the legatee (*Goods of King*, 1883, 8 P. D. 162). (ii.) Administrators. Here there is no chain of succession, each administrator deriving



title only from the Court; therefore, whenever an administrator, simple or with will annexed, leaves a portion of the estate unadministered, an administrator *de bonis non* will be necessary. The grant will go, according to the ordinary rule, to the person with the largest interest. Where the first administration was a simple one, the Court will consider who were the next-of-kin at the moment of the intestate's decease, not at the moment of the grant *de bonis non* (see *Goods of Carr*, L. R. 1 P. & D. and rules there laid down).

(2) *Durante minore ætate*.—This kind of administration has frequently been held not to be within 21 Hen. VIII. c. 5, and it was therefore discretionary with the Court to grant it to whomsoever it pleased (Williams, *op. cit.* p. 416).

The guardian is the person usually selected (for distinction between guardians to minors and to infants, see above). A testamentary guardian will be preferred to one chosen by the minors themselves (*Goods of Morris*, 1862, 2 Sw. & Tr. 360). The Court need not appoint the next-of-kin, *e.g.* where the husband has deserted his wife; on her death intestate, leaving minor children, the grant goes not to the husband, but to the guardian selected by the children (*Goods of Hay*, 1865, L. R. 1 P. & D. 51; *Goods of Stephenson*, 1866, L. R. 1 P. & D. 287). On the death of the father the mother is the legal guardian, and requires no election (49 & 50 Vict. c. 27, ss. 1, 2). Where the intestate died insolvent, leaving children but no known relatives, a creditor was appointed guardian (*Goods of Peck*, 1858, 1 Sw. & Tr. 141). Since 1897 the grant may go to the guardian of a minor heir-at-law (*Goods of Andern*, [1898] Prob. 147).

(3) *Durante absentia*.—If the executor or next-of-kin were out of the kingdom, the ecclesiastical Courts would always make a limited grant of administration during their absence. It is now possible to make such a grant in all cases of absence, even though the executor or administrator shall have got a grant first and gone abroad afterwards (C. P. Act, 1858, s. 18, extending previous Acts), provided they are abroad at or after the expiration of twelve months from the death of the testator or intestate; right is given to the next-of-kin, legatee, or any creditor to apply; this includes the personal representative of the legatee (*Goods of Collier*, 1862, 2 Sw. & Tr. 444). If the grant is made under a statutory power, the grant does not determine on return of the original grantee; *secus*, if the executor or administrator were absent to commence with; grants may be made during absence to attorneys of those entitled (*Webb v. Kirby*, 1856, 3 Sm. & G. 333). The power of such administrator determines on the death of his principal.

(4) *During Lunacy of Executor or Administrator*.—Where a sole personal representative becomes a lunatic the grant is usually made to his committee (Williams, *op. cit.* p. 441–444), who will be preferred to the next-of-kin (*Alford v. Alford*, 1857, 3 Jur. N. S. 990).

If the lunatic has not been found so on inquisition the Court will exercise discretion, granting to a residuary legatee, or if none, to next-of-kin, or to a stranger. Where one of three administrators became insane, the letters of administration were brought into the registry and issued to the other two alone (*Goods of Phillips*, 1824, 2 Add. 335). For case of a pauper lunatic and grant to nominee of guardians, see *Goods of Eccles*, 1889, 15 P. D. 1.

(5) *Pendente lite*.—The Court may appoint administrators pending suit in any case where a dispute is involved, provided there is necessity for the appointment. The administrator would only have power over personalty, and if realty were involved, the Court has power to appoint a receiver



thereof (C. P. Act, 1857, ss. 70, 71). This receiver of realty must be distinguished from a receiver in Chancery. *Semble*, since 60 & 61 Vict. c. 65, his appointment will no longer be necessary. The receiver of real estate had to give a bond in the ordinary way; and receivers and administrators appointed in this way must exhibit an inventory and render an account (Prob. Rules, C. B. rr. 79, 96). The nominee of the parties will usually be accepted (*De Chatelain v. De Pontigny*, 1858, 1 Sw. & Tr. 34); otherwise the Court will use its discretion.

The administrator's duties commence on day of appointment, and cease when the action or appeal is disposed of; his powers are those of an ordinary administrator, save that he cannot distribute the residue.

(6) *Miscellaneous Grants*.—If a man has appointed some one to act as an executor at the end of a period, an administrator will be necessary till the period lapses; grants may also be made to substantiate proceedings in other Courts, either here or abroad (*Macleay v. Davison*, 1859, 1 Sw. & Tr. 425; *Goods of Oldenburg*, 1884, 9 P. D. 234).

If property be left both here and abroad, and a will is in existence applying only to property abroad, a grant will be necessary as to pass the property here (*Goods of Main*, [1891] Prob. 293). Where there are no next-of-kin, creditors, or other person applying, the Court has discretionary power to grant administration *ad colligendum bona defuncti*; it will be granted where there is danger to the estate owing to its perishable character; it can be made where the next-of-kin refuses a grant of letters (*Goods of Radnall*, 1824, 2 Add. 232); or to a creditor, so as to realise the goodwill of a business for which a good offer requiring instant possession had been made (*Goods of Schwerdtfeger*, 1876, L. R. 1 P. D. 424); it may also be granted to the Solicitor of the Treasury.

In cases of limited administration the persons entitled to the general grant may take out a grant *cæterorum*, enabling them to deal with the rest of the estate. A grant, save and except, is the reverse of this, and is a general grant, save and except the limited one.

(iii.) *Practice*.—The practice as to simple administration is dealt with in Probate Rules, 1862, N. C. B., and much of what has been said above as to probate applies equally to administration. Application may be made at the principal registry in *all* cases (r. 1); no letters of administration are to issue till fourteen days after death, save by leave of judge or two registrars (r. 44); delay in application beyond three years must be explained; proof may also be required of identity (r. 48). The next-of-kin are the nearest blood relations living at the death of deceased intestate; if only one of such nearest blood relations applies, the registrars may require proof that the others have been cited (r. 28). Any person entitled to a general grant will not be given a limited one, save by leave of the judge on motion (r. 30); and no limited grant will be issued till all those entitled to general ones have consented, renounced, or refused to appear when cited (r. 29). Administrators, with and without a will, resident abroad, may take a grant themselves, or may get it through an attorney, properly appointed (r. 32). Grants are made to the guardian of a minor duly elected by the minor (r. 33); an infant under seven must have a guardian assigned by the judge or registrar (r. 34). The administrator must take the oath of office, and make the affidavit for Inland Revenue like the executor (r. 47). The oath of administrators must be so worded as to clear off all persons having a prior right to the grant, which must show on the face how the prior interests have been cleared off; the oath must set forth that the applicant is the only next-of-kin, or one of the next-of-kin,



as the case may be (r. 37). It is most important that the applicant should be rightly described in the affidavit (Powles, *op. cit.* p. 305). In addition to these affidavits, a bond, with sureties in double the amount under which the estate is sworn, is always required for administration (C. P. Act, 1857, ss. 81, 82), save in the case of the Solicitor to the Treasury applying on behalf of the Crown. The Court has no power of dispensing with the bond (*Goods of Powis*, 1864, 34 L. J. P. & M. 55). But the Court will dispense with sureties in special cases (Tristram, *op. cit.* p. 103). The registrars are to take care that the sureties are responsible persons (r. 41); clerks to solicitors are usually objected to, but guarantee societies will be accepted; so also the husband of the administratrix. If a married woman is tendered as surety, it must be proved on affidavit that she has sufficient separate property. Foreign sureties are accepted, though not if the administrator reside abroad (*O'Byrne*, 1828, 1 Hag. 316). Two sureties are usually required (r. 39); the bond is in a penalty of double the amount to be administered, unless the Court shall direct otherwise (C. P. Act, 1857, s. 82). Sureties in certain cases must justify by the rules (r. 42); the Court will also generally require justifying security to be given by administrator, if next-of-kin apply for it, or a legatee, at anyrate to the extent of their interests (*Jackson v. Jackson*, 1865, 1 P. & D. 14; *Pickering v. Pickering*, 1828, 1 Hag. 480). Creditors cannot usually require the administrator to justify, unless they can make out a very strong case (*John v. Bradbury*, 1866, 1 P. & D. 248).

[*Authorities.*—Williams on *Executors*, 9th ed.; Tristram and Coote, *Probate Practice*, 12th ed.; Powles and Oakley, *Probate*, 3rd ed.]

**Procedendo.**—Where the record of proceedings, either civil or criminal, has been removed into a superior Court by *certiorari* (*q.v.*), and it becomes necessary or expedient to restore the record to the inferior Court, a writ of *procedendo* issues on an order of a judge of the superior Court. The writ commands the judge of the inferior Court to proceed with the case, notwithstanding the writ of *certiorari* to him before directed. The order for a *procedendo* may be made by the judge in chambers (*R. v. Scaife*, 1852, 18 Q. B. 773). In civil matters a *procedendo* issues where a defendant who has removed proceedings by *certiorari* into the High Court does not thereupon proceed with the action promptly in accordance with the rules of procedure of the Supreme Court (see Chitty's *Archbold*, 14th ed., 1560; Chitty's *Forms*, p. 804; Tidd's *Prac.*, 9th ed., p. 407).

**Procedure.**—This word is commonly opposed to the sum of legal principles which constitute the substance of the law, and denotes the body of rules, whether of practice or of pleading or of evidence, whereby rights are effectuated through the successful application of the proper remedies. The procedure of the common law Courts was regulated by the C. L. P. Acts of 1852, 1854, and 1860; as to which, see Day's *C. L. P. Acts*. As to the procedure in equity, see Daniell, *Chan. Pr.* The procedure in actions in the High Court and the Court of Appeal is now governed for the most part by the rules in the schedule to the Judicature Act, 1875, and the Rules of the Supreme Court.

**Proceeding.**—"Any proceeding" (s. 89 of the Judicature Act, 1873) is equivalent to "any action," and does not mean any step in an



action (*Pryor v. City Offices Co.*, 1883, 52 L. J. Q. B. 365). But in r. 13, Order 64 R. S. C., "proceeding" is obviously used as meaning a step in an action; *i.e. semble*, a step "towards" and not "after" judgment. "Any other proceeding in the action" (Order 26, r. 1, R. S. C., means "any proceeding with a view to continuing the action" (*Spincer v. Watts*, 1889, 58 L. J. Q. B. 383).

The power given by sec. 85 of the Companies Act, 1862, to restrain "any action, suit, or *other proceeding*" against a company in liquidation, extends to quasi-criminal proceedings, *e.g.* for recovering penalties under the provisions of that Act (*In re Briton Medical Assurance*, 1886, 55 L. J. Ch. 418).

An examination of a witness, under sec. 115 of the Companies Act, 1862, is not a "proceeding" in a matter (*In re Grey's Brewery*, 1883, 53 L. J. Ch. 262); nor is a meeting of creditors for confirming or rejecting a scheme of arrangement of a debtor's affairs "a proceeding in Court" within subs. 1, sec. 105, Bank. Act, 1883 (*In re Strand*, 1884, 53 L. J. Q. B. 563).

It was decided in *Cropper v. Smith*, 1884, 54 L. J. Ch. 287, that the words "other legal proceeding" in sec. 18, subs. 10, of the Patents Act, 1883, refer to a proceeding for the revocation of a patent.

A power of attorney "to commence and carry on, or to defend, etc., all actions, suits, or other proceedings," was held in *Ex parte Wallace*, 1884, 54 L. J. Q. B. 293, to confer an authority to sign a bankruptcy petition. See also *In re Winterbottom*, 1886, 56 L. J. Q. B. 238.

Sec. 3 of the Newspaper Libel and Registration Act, 1881, which enacts that "no criminal prosecution shall be commenced against any proprietor, etc., without the written fiat of the Director-General of Public Prosecutions, etc., being first had and obtained," does not apply to criminal informations for libel (*Yates v. R.*, 1885, 54 L. J. Q. B. 258).

**Proceedings in lieu of Demurrer.**—Formerly the mode of disputing the sufficiency in law of the opponent's pleading was by "demurrer" (see DEMURRER). The Rules of the Supreme Court, 1883, abolished "demurrers," and substituted therefor other proceedings, termed "Proceedings in lieu of demurrer," by which objections in point of law to the previous pleading of an opponent *may* be taken (Order 25, rr. 1-4). Under these rules objections in point of law are no longer necessarily tried separately from issues of fact, and there is no longer of necessity an argument upon the point of law equivalent to the former argument on demurrer. Any party may by his pleading raise any point of law, and any point of law so raised shall be disposed of by the judge at or after the trial, or it may, by consent of the parties, or the order of the Court or a judge on the application of either party, be set down for hearing and disposed of at any time before the trial (Order 25, r. 2).

Points of law raised upon a pleading should be founded upon the facts appearing upon the face of the pleading of the opposite party (see Bullen and Leake's *Precedents of Pleadings*, 5th ed., p. 600), and may be pleaded to the whole, or to any distinct cause of action, ground of defence, counter-claim or reply, and they may be pleaded together with grounds of defence or of reply upon the facts (*ibid.* p. 599).

No technical objection should be raised to any pleading on the ground of any alleged want of form (Order 19, r. 26); and it would seem that objections on the ground of mis-joinder or non-joinder of parties should not be pleaded as objections in point of law under Order 25, r. 2, but should in general be taken by summons under Order 16, r. 11 (see Bullen and Leake's *Precedents of Pleadings*, 5th ed., pp. 27, 28). So, too, defences



under the Statute of Frauds, or sec. 4 of the Sale of Goods Act, 1893, or under the Statutes of Limitation, cannot be raised as objections in point of law, but must be pleaded by way of defence (*ibid.* pp. 709, 766).

For forms of pleadings of objections in point of law, see *ibid.* pp. 602–604, and R. S. C. 1883, App. E. s. iii.

By Order 25, r. 3, if, in the opinion of the Court or a judge, the decision of a point of law raised by a pleading substantially disposes of the whole action, or of any distinct cause of action, ground of defence, set-off, counter-claim, or reply therein, the action may be dismissed, or such order made therein as may be just.

In addition to the powers conferred by Order 25, r. 2, it is provided by Order 25, r. 4, that the Court or a judge may order any pleading to be struck out, on the ground that it discloses no *reasonable* cause of action or answer, and may in any such case, or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just.

**Proceeds**—The sum, amount, or value of goods, etc., sold or converted into money. Money paid under protest is the “proceeds” of goods and chattels taken under a *fi. fa.* within Order 57, r. 1 *b*, R. S. C. (*Smith v. Critchfield*, 1885, 54 L. J. Q. B. 366). As to proceeds of sale under the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71, s. 87), see *Jones v. Parcell*, 1883, 11 Q. B. D. 430.

As to “proceeds of sale” in company matters, see *Holmes v. Newcastle-upon-Tyne Freehold Abattoir Co.*, 1875, 1 Ch. D. 682, and *Brown v. Dale*, 1878, 9 Ch. D. 78.

A legacy payable out of personalty and of proceeds of the sale of real estate, is an interest in land within the Statutes of Mortmain, and cannot while it remains unpaid be bequeathed by the legatee for charitable purposes. Nor can there be any apportionment, so as to make that part of the legacy which would be paid out of personalty available for the charitable bequest (*Brook v. Badley*, 1867, L. R. 4 Eq. 106).

By a marriage settlement, lands were conveyed to trustees to the use of all the children equally, and his, her, and their heirs and assigns, with a power of sale, and a direction that the proceeds should be laid out in the purchase of other lands, or on Government or real securities, which, when purchased, should be made liable to the same trusts, estates, and limitations as were declared of the trust premises. The lands were sold and the proceeds invested on mortgage: held, that the proceeds of the sale must be treated as personalty and not as realty (*Earldom v. Saunders*, Amb. 240, distinguished; *Atwell v. Atwell*, 1871, L. R. 13 Eq. 23).

The proceeds of real property sold under the Settled Estates Acts, and not yet converted into realty, have not become personal property in respect of which letters of administration can be granted (*In re Mary Lloyd*, 1884, 9 P. D. 65).

The Court will not, unless upon application being made to it, sanction the repayment of wages, etc., to bondholders out of the proceeds of the sale of a ship (*The Cornelia Henrietta*, 1866, L. R. 1 Ad. & Ec. 51).

Respecting the proceeds of the sale of stolen property, see *R. v. Justices of C. C. C.*, 1886, 18 Q. B. D. 314.

**Proceed to Sea.**—See FINAL SAILING.



**Process.**—The word process, in its most comprehensive signification, includes not only the writ of summons, but all other writs which may be issued during the progress of an action, and also those writs which are used to carry the judgments of the Court into effect, and which are termed writs of execution.

“Process” is the doing of something in a proceeding in a civil or criminal Court; and that which may be done without the aid of a Court is not a “process.” Therefore a distraint, whether for rent or any other payment, and whether the right of distress be by the common law or by statute, is not a “process,” nor is it “an execution or other legal process,” within sec. 13 of the Bankruptcy Act, 1869, or within the substituted section (s. 10) of the Bankruptcy Act, 1883 (*R. v. Crisp*, 1818, 1 Barn. & Ald. 287; *Ex parte Birmingham and Staffs. Gas Co., In re Fanshaw*, 1871, 40 L. J. Bank. 52; *In re Peake, Ex parte Harrison*, 1884, 53 L. J. Ch. 977). But a writ of sequestration is such a process (*In re Browne*, 1870, 40 L. J. Bank. 46).

**Processum continuando**—A writ for the continuance of process after the death of the chief justice or other justices in the commission of oyer and terminer (*Reg. Orig.* 128).

**Prochein Amy.**—See NEXT FRIEND.

**Prochein Avoidance.**—12 Anne, stat. 2, c. 12, 1714, declares void and prescribes heavy penalties for the purchase by a clergyman of the next avoidance or presentation to any benefice with cure of souls; but the purchase of an estate for life in an advowson is not such a purchase, though there be only one avoidance during the lifetime of the *cestui-que vie*—the statute applying only to chattel interests (*Walsh v. Bishop of Lincoln*, 1875, L. R. 10 C. P. 518). It was held in *Hatch v. Hatch* (1855, 20 Beav. 105) that a devise of “the next avoidance” of a living meant the next which the testator had power to dispose of. See ADVOWSON; SIMONY.

**Proclamation.**—A royal proclamation is defined by Anson, vol. ii. p. 45, as a formal announcement of an executive act, such as a dissolution or a summons to Parliament, a declaration of war or peace, the enforcement of the provisions of a statute the operation of which is left to the discretion of the Crown in Council. The act is a resolution of the Queen in Council, but the document by which it is promulgated passes under the Great Seal.

Even after the rise of Parliament the Crown occasionally purported to legislate by ordinance or proclamation without consent of Parliament. The Statute of Proclamations (31 Hen. VIII. c. 8) provided that proclamations made by the King with the advice of his Council were to be observed as though made by Act of Parliament, but this was not to be prejudicial to “any person’s inheritance, offices, liberties, goods, chattels, or life.” This statute was repealed by 1 Edw. VI. c. 12, but the practice nevertheless continued. In the great case of *Proclamations* in 1610, 12 Rep. 74, the judges advised the Crown that the King cannot by proclamation make an offence which was not one before; for then he might alter the law of the land in a high point; but that the King, for the prevention of offences, may by proclamation admonish his subjects that they keep the laws and do not



offend against them, upon punishment to be inflicted by law; and that the neglect of such proclamation aggravates the offence. Illegal proclamations continued to be issued until the abolition of the Court of Star Chamber which had enforced them.

**Proclamation of War.**—See WAR.

**Pro-consul.**—Pro-consuls are consular officers of the lowest grade. Their functions are merely notarial, and require no recognition on the part of the foreign State in which they are discharged. Their office was thus limited by 52 Vict. c. 10, and 54 & 55 Vict. c. 50, until they were enabled to celebrate marriages by the Foreign Marriage Act, 1892, if provided with marriage warrants, or left in charge of consulates or vice-consulates. Their appointment as pro-consuls confers no authority to perform any other consular duties (Hall, *Foreign Jurisdiction*, p. 17). See CONSUL.

**Proctor.**—This word is used in ecclesiastical law in two connections :

1. The person appearing for a party in an ecclesiastical suit, in the same manner as a solicitor in a civil one. Various ancient canons and constitutions prescribed that proctors should be properly appointed, with the approbation of the judge, signified by affixing his seal, and the consent of the party, signified by warrant under his hand, called a proxy; and a similar provision is contained in Canon 129 of 1603, while Canons 130 and 131 forbid proctors to undertake suits without the counsel and advice of an advocate, or to admit a libel or conclude a cause without the knowledge of the advocate retained by the party. The pleading of proxies of appearance by proctors was excepted from the Act against forgeries (5 Eliz. c. 14, 1563) by sec. 12 of the Act. Proctors were admitted to practise in the Court of Arches only after serving a clerkship of seven years, and a proctor in the Arches Court might practise in a diocesan Court of the province without formal admission there. By 33 & 34 Vict. c. 28, s. 20, 1870, attorneys and solicitors were permitted to act as proctors in all ecclesiastical Courts except the provincial Court of Canterbury and York and the diocesan Court of London, and the privilege was extended to all ecclesiastical Courts by 40 & 41 Vict. c. 25, s. 17, 1877 (see also CONSISTORY COURT; ADVOCATES, COLLEGE OF).

2. A representative of the chapter of a cathedral, or the beneficed clergy of a diocese or archdeaconry in Convocation (*q.v.*).

The word "proctor" means simply one who undertakes the conduct of business for another (*procurator*), and in addition to the above senses it was in early times used to designate the officer now known as a churchwarden (*q.v.*). It is also applied to functionaries having disciplinary and other powers in the universities (see UNIVERSITIES).

**Procuration.**—A signature to a bill of exchange by procuration ("per proc," or "p. p.") operates as notice that the agent has but a limited authority to sign, and the principal is only bound by such signature if the agent, in so signing, was acting within the actual limits of his authority (Bills of Exchange Act, 1882, s. 25). The person so signing the bill is not personally liable as if he were signing for himself (*ibid.* s. 26), unless the



pretended principal is non-existent (*Kelner v. Baxter*, 1866, L. R. 2 C. P. 174, but *quære* as to the exception), but he may be liable in damages for FRAUD (*Polhill v. Walter*, 1832, 3 Barn. & Adol. 114) or breach of warranty of authority (*Collen v. Wright*, 1857, 27 L. J. Q. B. 215).

Although the notice of procuration puts the taker of the bill upon inquiry as to the extent of the agent's authority, it does not prevent him relying upon any "holding out" of the agent, which estops the principal from denying the agent's authority (*Smith v. McGuire*, 1858, 3 H. & N. 554).

And if the agent has authority, but abuses it, the abuse does not affect a *bonâ fide* holder for value (*Bryart v. Banque du Peuple*, [1893] App. Cas. 170). Whenever the very act of the agent is authorised by the terms of the power of attorney, that is, whenever by comparing the act done by the agent with the words of the power, the act is itself warranted by the terms used, such act is binding on the principal in favour of all persons dealing in good faith with the agent, and they are not bound to inquire into facts *aliunde* (*loc. cit.*). See BROKER, vol. ii. p. 265, and PRINCIPAL AND AGENT.

**Procuration Fee**—A sum of money or commission taken by scriveners on effecting loans of money. A solicitor for a mortgagee was, by the 12 Anne, st. 2, c. 16, not allowed to take more than 5s. in the pound as procuration money on a loan by way of mortgage; but by 17 & 18 Vict. c. 90 this restriction is abolished.

As to procuration in ecclesiastical matters, see Phill. *Eccl. Law*, 2nd ed., p. 1059.

**Procuration of Women.**—See BROTHEL.

**Procureur**—The judicial official at the head of the *ministère public* attached to every civil, as distinguished from commercial, Court in France. The procureurs of the Court of Cassation and Appeal Courts have the title of *procureurs généraux*, and of the Courts of first instance of *procureur de la république*. The functions of this officer, who holds his appointment at the discretion of the Government, are to act where the interests of public order require. He is said to exercise *l'action publique* as opposed to the *action privée*, which concerns only private interests. All criminal proceedings are brought and carried on in his name and under his supervision, and the preliminary proceedings are in his discretion.

In civil proceedings his function is to observe and make any observations in Court at the close of the hearing which he may think fit, and he is bound by law to give his opinion wherever public order, the State, public property, or a local authority (*commune*), married women, minors or persons whose legal capacity is under restraint (*interdits*) are concerned.

The *procureur général* is assisted by deputies called *avocats généraux*, and the *procureur de la république* by *substituts du procureurs*.

It is seen that the functions of the procureur are very different from those of the public prosecutor in England, and that this term is by no means a translation of *procureur* (see PARQUET).

**Production of Cestui-que vie.**—See LIFE, ESTATES FOR, vol. vii. at p. 436.



**Professional Misconduct.**—See INFAMOUS CONDUCT; ADVOCATE; BAR; MEDICAL PRACTITIONER; SOLICITOR; STOCK EXCHANGE.

**Professional Witness.**—See EVIDENCE, vol. v. at p. 90; MEDICAL JURISPRUDENCE, vol. viii. at p. 306.

**Profits.**—"The word 'profits' in the Income Tax Act (5 & 6 Vict. c. 35) has a different meaning in law to that which it has in common parlance." "It is the amount got from the property *minus* the cost of getting it" (per Jessel, M. R., *Mersey Docks v. Lucas*, 1881, 51 L. J. Q. B. 116; *Erichsen v. Last*, 1881, 51 L. J. Q. B. 86). In *Russell v. Town and County Bank*, 1888, 58 L. J. P. C. 8, it was held that a banking company, whose manager resided in the bank building, was entitled to deduct from its profits liable to income tax the rent or value of the whole building, including the part where the manager resides (see also *Paddington Burial Board v. Inland Revenue*, 1884, 53 L. J. Q. B. 224; *St. Andrew's Hospital v. Shearsmith*, 1887, 31 Sol. J. 608).

In *Last v. London Assurance Co.*, 1885, 55 L. J. Q. B. 92, in the House of Lords (Lords Blackburn and Fitzgerald; Lord Bramwell dissenting), it was ruled that bonuses by an insurance company to participating policyholders are "profits" chargeable with income tax. See also *New York Life Insurance Co. v. Styles*, 1889, 13 App. Cas. 381; and *Clerical and Medical Life Assurance Society v. Carter*, 1889, 58 L. J. Q. B. 224.

**Profits à prendre.**—A *profit à prendre* is a right similar to an easement, but distinguished from it by the special feature entitling the dominant owner to take something from the land of the servient owner for his own use or benefit. An easement entitles the dominant owner to enter his neighbour's land and make some use of it, but without taking any tangible profit from the soil, or to prevent his neighbour doing something on his own land, as, for instance, building, for the benefit of the dominant owner; while a *profit à prendre* entitles him not only to enter the land, but to take something from it for his own use (see EASEMENT). As illustrations of these rights respectively, we may mention rights of way, that is rights permitting a man to walk over another's soil to the dominant tenement, or to use a watercourse flowing through another's land for the benefit of his own property, or of uninterrupted light to a building, as easements; and rights to enter and take away stones, or turf, or fish from another's water, or to hunt or shoot and take away game, and rights of common, as *profits à prendre*. The distinction was drawn in the case of *Peers v. Lucy* (6 Will. & Mary, 4 Mod. Rep. 355), where it was said: "The word 'easement' is known in law, but here the thing itself is set forth—namely, to catch fish—and certainly no instance can be given of a prescription for such a liberty by such a word or name." What would appear at first sight to be an exception to this principle is the case of a right to enter land and take water for use elsewhere. This is an easement and not a *profit à prendre*, because water is not a part of the produce of the soil, nor the property of the owner of the land where it is standing or over which it is flowing. The right, therefore, is no exception to the general rule (*Race v. Ward*, 1855, 4 El. & Bl. 702).

Another distinction between easements and *profits à prendre* is that



easements can only exist in connection with and for the benefit of a dominant estate, while *profits à prendre* may be had in gross, that is the dominant owner may be entitled to them irrespectively of any estate in land, and simply as belonging and having belonged to him and his ancestors. Instances of *profits à prendre* in gross may be found in the cases of *Shuttleworth v. Le Fleming*, 1865, 19 C. B. N. S. 687, and *Welcome v. Upton*, 1840, 6 Mee. & W. 536.

A *profit à prendre* is not a corporeal right, that is a right to any part of the soil, but it is incorporeal, inasmuch as it is a right merely to enter and take some indefinite part or product of the soil, and in this respect the right is analogous to an easement. This may be illustrated from the case of *Chetham v. Williamson*, 1804, 4 East, 469, which was an action of trover for coals, where the right granted by deed was at all times thereafter to enter certain land to search for and dig for coal or stone or any other mine or mineral whatsoever, and the same to take, have, and carry away to the grantee's own use. Here the right granted was not to all the coal and stone in the soil, which would have been a grant of a definite part of the soil, but a right to enter and take any that might be found, which conferred no exclusive right to dig for coal, and no title to any of the coal till appropriated by digging and possession taken. A similar instance may be found in *Wilkinson v. Proud*, 1843, 11 Mee. & W. 33.

*Profits à prendre*, like easements, can be acquired either by grant or prescription, but grants may be presumed to have been made in many cases of ancient user, and in all cases of prescription, although no evidence can be adduced of their existence in point of fact (see EASEMENT and PRESCRIPTION). A difference, however, exists between prescription for an easement and prescription for a *profit à prendre*. At common law there was, before the date of the Prescription Act, 2 & 3 Will. IV. c. 71, no difference between them; user had to be proved from time immemorial, which, however, in later times was presumed on proof of user for twenty years in the absence of evidence of its actual commencement. In *Bailey v. Appleyard*, 1838, 8 Ad. & E. 161, there had been enjoyment for twenty-eight years, which Littledale, J., said would have been sufficient before the Act. But by the Prescription Act, 2 & 3 Will. IV. c. 71, it is expressly laid down in the first section that "no claim which may be lawfully made at the common law, by custom, prescription, or grant to any right of common or other profit or benefit to be taken and enjoyed from or upon any land . . . shall, where such right, profit, or benefit shall have been actually taken and enjoyed by any persons claiming right thereto without interruption for the full period of *thirty* years, be defeated or destroyed by showing only that such right, profit, or benefit was first taken or enjoyed at any time prior to such period of thirty years . . . and when such right, profit, or benefit shall have been so taken and enjoyed as aforesaid for the full period of *sixty* years, the right thereto shall be deemed absolute and indefeasible . . ." In the case of easements, the periods appointed for statutory prescription were respectively twenty and forty years, instead of thirty and sixty. It has been held that the purpose of the Legislature in thus fixing these periods for prescription was not to supersede the common law (except in the case of light, *Tapling v. Jones*, 1865, 11 H. L. 290), but merely to shorten the periods for which it was necessary to bring evidence of user without the risk of the claim being defeated by evidence of the commencement of the user or of non-user at some remote period (*Holford v. Hankinson*, 1844, 5 Q. B. 584; *Annesley v. Glover*, 1875, L. R. 11 Ch. 283).



Though easements, and certain rights possessed by bodies of persons in gross, as rights of inhabitants of a place to sport or walk over land, may be claimed by custom, *profits à prendre* cannot, except in the case of manorial customs. The reasons for this are elaborately argued in *Gateward's case*, 4 Jac. I., 6 Co. Rep. 59 *b*; Cro. (2) 152. See also *Mellor v. Spateman*, 21 Car. II., 1 Wms. Saun. 340 *c*, note 3; *Constable v. Nicholson*, 1863, 14 C. B., N. S. 239; *Blewett v. Tregonning*, 1835, 3 Ad. & E. 585.

Rights of COMMON are undoubtedly the class of *profits à prendre* most frequently met with. According to the judgment of the justices in *Gateward's case* (*supra*), there are four kinds of rights of common, namely, common appendant, appurtenant, in gross, and by reason of vicinage. Mr. Serjeant Stephen (*Com.* vol. i. p. 621) divides these rights into five sorts or species, namely, common of PASTURE, or the right of feeding cattle; common of PISCARY, or the right of fishing; common of TURBARY, or the right of cutting turf; common of ESTOVERS, or the right of cutting wood; and common in the SOIL, or the right of digging for coal, minerals, stones, or the like (see MINES AND MINERALS). Of these, the same learned author says, common of pasture is the principal, being the right which a man has to feed his beasts on another's land, and that this and the three next mentioned species of common had all, no doubt, when originally established, reference to the same object, that is the maintenance and carrying on of husbandry—common of piscary being given for the sustenance of the tenant's family, common of turbary for his fuel, and common of estovers for repairing his house, his instruments of tillage, and the necessary fences of his grounds. As to common appendant, common appurtenant, common in gross, and common by reason of vicinage, see article COMMON.

*Common of shack* is a right somewhat similar to common of pasture. It is a right belonging to individuals occupying lands lying together in the same common field to turn out their beasts after harvest to feed promiscuously in that field.

Common of pasture may be limited or unlimited as to time, that is it may be limited to particular parts of the year or enjoyable all the year round; but as to the number of beasts for which it can be enjoyed it must always (except in the case of common in gross) be limited, that is restricted to some particular number, as for all cattle *levant* and *couchant*, that is for such cattle as the dominant land is capable of maintaining in winter. Common of pasture is sometimes called common *without number*; not that the number is unlimited, but because seasons vary and the dominant land may in some years be capable of sustaining more than in others. This expression distinguishes the right from one where the number is absolutely fixed, but still it is certain or can be reduced to a certainty as to number. Common *in gross* may be limited as to number or absolutely unlimited, in which case it is called a common *without stint* or *sans nombre*.

Under the Statute of Merton (20 Hen. III. c. 4) the lord of a manor might inclose so much of his waste land against common of pasture, though not against common of estovers or turbary, as he pleased for tillage or growing wood, if he left sufficient common for those entitled thereto. This inclosure was called "approving," which meant the same as "improving." Of late years, however, inclosure of commons has been regulated and carried on to a great extent under the General Inclosure Act, 41 Geo. III. c. 109, and the more recent Statute 8 & 9 Vict. c. 118, and numerous local Acts of Parliament.



See also INCLOSURE ACTS ; METROPOLITAN COMMONS ; PARTITION.

[*Authorities*.—See Stephens, *Commentaries*, vol. i. ; and Hall on *Profits à Prendre*.]

**Profits, Mesne.**—See RECOVERY OF LAND.

**Prohibited Degrees.**—The following is the table of kindred and affinity usually printed with the Book of Common Prayer, persons related wherein are “forbidden by Scripture and our laws to marry.” (For its history, see AFFINITY ; CONSANGUINITY ; and Lyndhurst’s Act, 1835, c. 54.)

A MAN MAY NOT MARRY HIS

1. Grandmother.
2. Grandfather’s wife.
3. Wife’s grandmother.
4. Father’s sister.
5. Mother’s sister.
6. Father’s brother’s wife.
7. Mother’s brother’s wife.
8. Wife’s father’s sister.
9. Wife’s mother’s sister.
10. Mother.
11. Stepmother.
12. Wife’s mother.
13. Daughter.
14. Wife’s daughter.
15. Son’s wife.
16. Sister.
17. Wife’s sister.
18. Brother’s wife.
19. Son’s daughter.
20. Daughter’s daughter.
21. Son’s son’s wife.
22. Daughter’s son’s wife.
23. Wife’s son’s daughter.
24. Wife’s daughter’s daughter.
25. Brother’s daughter.
26. Sister’s daughter.
27. Brother’s son’s wife.
28. Sister’s son’s wife.
29. Wife’s brother’s daughter.
30. Wife’s sister’s daughter.

A WOMAN MAY NOT MARRY HER

1. Grandfather.
2. Grandmother’s husband.
3. Husband’s grandfather.
4. Father’s brother.
5. Mother’s brother.
6. Father’s sister’s husband.
7. Mother’s sister’s husband.
8. Husband’s father’s brother.
9. Husband’s mother’s brother.
10. Father.
11. Stepfather.
12. Husband’s father.
13. Son.
14. Husband’s son.
15. Daughter’s husband.
16. Brother.
17. Husband’s brother.
18. Sister’s husband.
19. Son’s son.
20. Daughter’s son.
21. Son’s daughter’s husband.
22. Daughter’s daughter’s husband.
23. Husband’s son’s son.
24. Husband’s daughter’s son.
25. Brother’s son.
26. Sister’s son.
27. Brother’s daughter’s husband.
28. Sister’s daughter’s husband.
29. Husband’s brother’s son.
30. Husband’s sister’s son.

## Prohibition.

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NATURE OF THE WRIT OF PROHIBITION.—The writ of Prohibition is a prerogative writ issued out of a Court of superior jurisdiction, and directed



to the judge of an inferior Court, or to a party to a suit in an inferior Court, or to any other person whom it may concern, commanding that no further proceedings be had in a particular cause.

Prohibition is a writ of ancient origin, and was the prerogative remedy provided by the common law for encroachment of jurisdiction by any inferior tribunal. It is, as is the case with most of the institutions of the common law, impossible to gauge accurately the antiquity of the writ of Prohibition; to do so, indeed, would serve no useful purpose; but it may be mentioned that Glanville, writing in the reign of Henry II. (*circa* 1181), refers to cases of prohibition issued to the Ecclesiastical Courts (see Glanville, *De Legibus*, lib. iv. chs. xii.–xiv.), and there is an authentic instance of the grant of a writ of Prohibition against a bishop in the third year of the reign of Edward I. (see 2 Rolle, *Abr.* 1668, p. 281); nor is there any reason for supposing that these were by any means the earliest instances of its issue.

Formerly the most important application of the writ of Prohibition was in cases arising in the Ecclesiastical Courts, at a time when the jurisdiction of those Courts was very much more extensive than at present. The superior Courts of common law have from the earliest times exercised a controlling influence over the ecclesiastical jurisdiction, and jealously restrained any excess of jurisdiction by means of prohibition. Frequent instances are to be found of Prohibitions being issued to the Ecclesiastical Courts, not only where they had trespassed upon the jurisdiction of the common law, but also in every other case of excess of authority, even though the cognisance of the matter did not properly belong to any other tribunal (see *Registrum Brevium*, 1634; Fitzherbert, *Natura Brevium*; Comyns, *Dig.* tit. "Prohibition" (F. 1)). And it has always been held sufficient, in order to give the temporal Courts a right of interfering, to show a want of jurisdiction in the Ecclesiastical Courts, without pointing out any other remedy (see Lloyd on *Prohibition*, 1849, ch. vii. p. 24).

Sir Edward Coke in his *Institutes* states that Prohibitions by law are to be granted at any time to restrain a Court to intermeddle with or execute anything which by law they ought not to hold plea of, and the King's Courts that may award Prohibitions, being informed either by the parties themselves or by any stranger that any Court, temporal or ecclesiastical, doth hold plea of that whereof they have not jurisdiction, may lawfully prohibit the same as well after judgment and execution as before (2 *Inst.* 602).

Sir Matthew Hale, writing of the jurisdiction of the ecclesiastical and other inferior Courts, and the general superintendence of the common law in relation to those Courts, says: "First, as the laws and statutes of the realm have prescribed to those Courts their bounds and limits, so the Courts of common law have the superintendency over those Courts, to keep them within the limits and bounds of their several jurisdictions, and to judge and determine whether they have exceeded those bounds or not; and in case they do exceed their bounds, the Courts at common law issue their prohibitions to restrain them, directed either to the judge or party, or both; and also, in case they exceed their jurisdiction, the officer that executes the sentence, and in some cases the judge that gives it, are punishable in the Courts at common law, sometimes at the suit of the king, sometimes at the suit of the party, and sometimes at the suit of both, according to the variety and circumstances of the case. Secondly, the common law and the judges of the Courts of common law have the exposition of such statutes or Acts of Parliament as concern either the extent of the jurisdiction of



those Courts, whether ecclesiastical, maritime, or military, or the matters depending before them; and therefore, if those Courts either refuse to allow these Acts of Parliament, or expound them in any other sense than is truly and properly the exposition of them, the king's great Courts of the common law, who next under the king and his Parliament have the exposition of those laws, may prohibit and control them" (*History of the Common Law*, ch. ii.).

This supervision of the common law Courts over the jurisdiction and acts of the various inferior Courts has now, since the Judicature Act, 1873, devolved upon the Queen's Bench Division of the High Court of Justice. The jurisdiction with regard to the granting of the extraordinary remedy by means of the prerogative writ of Prohibition is now, as will appear in the course of this article, to a large extent discretionary.

The remedy by prohibition is preventive rather than corrective. In this respect prohibition is to be distinguished from mandamus, for a mandamus is issued to compel the performance of some act which ought to be done, and which has not been done (see MANDAMUS); and a Prohibition, on the other hand, is issued to prevent the doing of an act which ought not to be done, or, in other words, to restrain the doing of an act in excess of jurisdiction.

Prohibition being an extraordinary remedy of a prerogative nature, the jurisdiction in prohibition is only to be resorted to in the absence of any other adequate legal remedy, and the existence of another complete remedy would be a ground for refusing the writ. It follows therefore that prohibition will not lie in any case where there is a sufficient remedy by appeal from the judgment or order of the inferior Court (see further on this point the cases referred to *post*, under the head *Wrong Decision of Inferior Court*).

COURTS FROM WHICH PROHIBITION ISSUES.—A Prohibition, says Blackstone, is a writ issuing properly only out of the Court of King's Bench, being the king's prerogative writ; but for the furtherance of justice it may now also be had in some cases out of the Court of Chancery, Common Pleas, or Exchequer, directed to the judges and parties of a suit in any inferior Court, commanding them to cease from the prosecution thereof, upon a suggestion that either the cause originally, or some collateral matter arising therein, does not belong to that jurisdiction, but to the cognisance of some other Court (Black. *Com.* bk. iii. p. 112).

Under the old system, therefore, applications for prohibition might have been made to the Court of Common Pleas, the Court of Exchequer, or to the Court of Queen's Bench separately. Since the merger of those Courts by the Judicature Act, 1873, it is the usual practice for writs of Prohibition to be moved for from the Crown side of the Queen's Bench Division. There is, however, as has recently been pointed out, nothing necessarily confining prohibition to Crown practice, and it is incorrect to say that it essentially and virtually belongs to the Crown side of the Queen's Bench Division (see per Bowen, L.J., *The Recepta*, [1893] Prob. (C. A.) at p. 263). Writs of Prohibition have been granted by the Chancery Division (see *Jones v. Slee*, 1886, 32 Ch. D. (C. A.) 585; *In re Briton Medical and General Life Association*, 1888, 39 Ch. D. 61). And it has recently been held that by virtue of the Judicature Act, 1873, a judge of the Admiralty Division has all the powers as to prohibition of a judge of the High Court (*The Recepta*, [1893] Prob. (C. A.) 255).

There appears to have been a practice of issuing writs of Prohibition out of the Petty Bag Office on a mere formal affidavit that there was no



cause of action within the jurisdiction of the inferior Court. That a writ should issue prohibiting a County Court without any judicial sanction was an anomaly. It was held that a judge of the High Court sitting at chambers had jurisdiction to set aside a writ of Prohibition issued out of the Petty Bag Office directed to a County Court (see *Amstell v. Lesser*, 1885, 16 Q. B. D. 187).

COURTS TO WHICH PROHIBITION LIES.—With regard to the question of what Courts may be restrained by prohibition, it was stated by Coke, C.J., in the Court of King's Bench in the reign of James I. that "we here in this Court may prohibit any Court whatsoever, if they transgress and exceed their jurisdiction. And there is not any Court in Westminster Hall but may be by us here prohibited, if they do exceed their jurisdictions, and all this is clear and without any question" (*Warner v. Suckerman and Coates*, 1615, 3 Bulst. at p. 120). Notwithstanding this general statement, however, there appear to be very few, if any, reported cases in which a Prohibition was actually granted by the Court of King's Bench to any of the common law Courts at Westminster, or to the Court of Chancery (see Shortt on *Informations, Mandamus, and Prohibition*, p. 427). But the question is now of no practical importance, the old Courts of Common Law and Chancery having been merged in the High Court of Justice by the Judicature Act, 1873, and it being expressly provided by that Act (s. 24 (5)) that no cause or proceeding at any time pending in the High Court of Justice or before the Court of Appeal, shall be restrained by prohibition or injunction.

There is no decision as to whether a Prohibition will lie to the Judicial Committee of the Privy Council. There has, indeed, been a strong expression of opinion that the Judicial Committee of the Privy Council, so long as it is exercising ecclesiastical jurisdiction, is subject to the controlling jurisdiction of the Queen's Bench by way of prohibition (see per Cockburn, C.J., *Martin v. Mackonochie*, 1878, 3 Q. B. D. at p. 747).

Lord Blackburn, in his judgment in the same case, in the House of Lords, said: "I think that there is authority for saying that the temporal Court proceeding in prohibition to restrain excess of jurisdiction in the Court ecclesiastical is not bound by a decision of even the highest Court of Appeal in ecclesiastical matters" (*ibid.* 1881, 6 App. Cas. at p. 447; see also per Lord Denman, C.J., *Chesterton v. Farlar*, 1838, 7 Ad. & E. at p. 719). On the other hand, there is no case to be found in which prohibition has been granted against the Privy Council, and the jurisdiction was doubted in some of the judgments in the House of Lords in the case of *Martin v. Mackonochie*, though that case leaves the question undetermined.

It may be stated generally that prohibition will lie to all Courts of inferior jurisdiction, and even to a pretended Court (see per Holt, C.J., *Chambers v. Jennings*, 1702, 2 Salk. 553).

The writ has from time to time been granted to numerous Courts that have now ceased to exist, which it is therefore needless to specify. A Prohibition may issue to a Court exercising criminal jurisdiction, as well as to a civil Court (see *R. v. Hereford*, 1860, 3 El. & El. 115). So the writ will lie to a coroner (*ibid.*), to a recorder (see *Liverpool United Gas Light Co. v. The Overseers of the Poor of Everton*, 1871, L. R. 6 C. P. 414), to petty sessions (see *R. v. Higgins*, 1843, 8 Q. B. 149, note), to Quarter Sessions (see *R. v. Justices of Middlesex*, 1881, 45 J. P. 420; see also *Pomfraye's case*, 1629, Lit. 163), and to naval and military courts-martial and prize Courts (see *Grant v. Gould*, 1792, 2 Black. H. at p. 100; see also *Smart v. Wolff*, 1789, 3



T. R. 323). And, among Courts of civil jurisdiction, prohibition has been granted to the various Ecclesiastical Courts, the University Courts (see *Chancellor, etc., of Oxford v. Taylor*, 1841, 1 Q. B. 952), the Palatine Courts, the County Courts, the Mayor's Court of the city of London (see *Alderton v. Archer*, 1884, 14 Q. B. D. 1; see also *The Mayor, etc., of London v. Cox*, 1866, L. R. 2 H. L. 239; *Kutner v. Phillips*, [1891] 2 Q. B. (C. A.) 267), the Salford Hundred Court (see *Farrow v. Hague*, 1864, 3 H. & C. 101; *Chadwick v. Ball*, 1885, 14 Q. B. D. 855; *Whitehead v. Butt*, 1891, 7 T. R. 609), and the Liverpool Court of Passage (see *R. v. The Mayor, etc., of Liverpool*, 1887, 18 Q. B. D. 510; *Fellowes v. The Lord Stanley*, [1893] 1 Q. B. 98).

Moreover, of recent times prohibition has been granted to prevent acts by various public bodies of statutory creation, such, for example, as Railway Commissioners (see *South-Eastern Rwy. Co. v. The Railway Commissioners and Mayor, etc., of Hastings*, 1881, 6 Q. B. D. 586), Inclosure and Improvement Commissioners (see *Church v. The Inclosure Commissioners*, 1862, 11 C. B. N. S. 664), Tithe Commissioners (see *In re Ystradgunlais Tithe Commutation*, 1844, 8 Q. B. 32; see, however, *In re Appledore Tithe Commutation*, 1845, *ibid.* 139).

And it has been said that the Court should not be chary of exercising the power of prohibition, and that whenever the Legislature intrusts to any body of persons, other than to the superior Courts, the power of imposing an obligation upon individuals, the Court ought to exercise as widely as they can the power of controlling those bodies of persons if they admittedly attempt to exercise powers beyond those given to them by Act of Parliament (see per Brett, L.J., *R. v. Local Government Board*, 1882, 10 Q. B. D. at p. 321).

PRINCIPLES UPON WHICH PROHIBITION IS GRANTED.—*Excess of Jurisdiction*.—Prohibition is, as a rule, granted to restrain a Court from acting without jurisdiction or in excess of its jurisdiction.

The general doctrine is that prohibition will never be granted where the Court sought to be affected by it has clear jurisdiction (see, for example, *In re The New Par Consols Ltd.* (No. 2), [1898] 1 Q. B. 669), unless it is proceeding in a manner contrary to the principles, not the rules, of the common law (see *Ex parte Story*, 1852, 12 C. B. at p. 777).

It is a well-known rule of the common law, which has already been referred to, that the King's Courts that may award Prohibitions, being informed either by the parties themselves or by any stranger that any Court, temporal or ecclesiastical, doth hold plea of that whereof they have not jurisdiction, may lawfully prohibit the same as well after judgment and execution as before (see 2 *Inst.* 602; see also per Pollock, B., *R. v. The Judge of the County Court of Lincolnshire*, 1887, 20 Q. B. D. at p. 170).

In other words, prohibition will generally be granted where an inferior Court acts without jurisdiction or in excess of jurisdiction. And even though the inferior Court has jurisdiction as to part of the subject-matter of the action, yet if there be any portion of the cause of action which is beyond the jurisdiction, prohibition will lie (see *Rowland v. Hockenhull*, 1691, Raym. (Ld.) 698; *Lord Camden v. Horne*, 1791, 4 T. R. 397; *Gold v. Turner*, 1874, L. R. 10 C. P. 149).

But where the subject of a suit in an inferior Court is within the jurisdiction of that Court, though in the proceedings a matter be stated which is out of its jurisdiction, yet unless it is proceeding to try such matter prohibition will not lie (see *Dutens v. Robson*, 1789, 1 Black. H. 100; see also *Read v. Brown*, 1888, 22 Q. B. D. 128).



Where the superior Court is clearly of opinion both with regard to the facts and the law that the inferior Court is acting in excess of or without jurisdiction, the writ of Prohibition will be granted, and in such a case, it was formerly said, neither the smallness of the claim nor delay on the part of the applicant is a reason for refusing the writ (see *Worthington v. Jeffries*, 1875, L. R. 10 C. P. 379).

In Courts where there are formal pleadings the jurisdiction is ousted, and prohibition will consequently lie, as soon as any matter that may involve a question which is not cognisable by the Court is pleaded (see *Tinniswood v. Pattison*, 1846, 3 C. B. 243). On the other hand, to deprive the Court of jurisdiction in cases where there are no pleadings, it must appear affirmatively in evidence that a matter has arisen over which the Court has no authority (see *Lilley v. Harvey*, 1848, 17 L. J. Q. B. 357; *Lloyd v. Jones*, 1848, 17 L. J. C. P. 206). Where an inferior Court proceeds in a cause properly within its jurisdiction, no prohibition will be awarded until the pleadings raise some issue which the Court is incompetent to try (see *The Mayor, etc., of London v. Cox*, 1866, L. R. 2 H. L. 239).

As a general rule, in order to give an inferior Court jurisdiction, it is necessary that the cause of action should have arisen within the local limits of such Court, or that the defendant, and in some cases both plaintiff and defendant, be resident within such limits, at the time the action is brought; hence in cases where, though the subject-matter of the action is within the jurisdiction but the case is not within the local limits of the Court, prohibition will lie (see *Rowland v. Hockenulle*, 1691, 1 Raym. (Ld.) 698; *Jacobs v. Brett*, 1875, L. R. 20 Eq. 1; *Hawes v. Paveley*, 1876, 1 C. P. D. 418; *Moore and Another v. Gamgee*, 1890, 25 Q. B. D. 244).

In any case where an inferior Court encroaches upon or interferes with the jurisdiction of the superior Courts, prohibition will lie, as, for example, where an inferior Court takes cognisance of a case in respect of which an action is pending in a superior Court, or where an action is brought in an inferior Court on a judgment of a superior Court (see *Anonymous*, 1614, 1 Rolle, 54).

Any irregularity, also, on the part of the judge of an inferior Court, such as will amount to an excess of jurisdiction, will be ground for a Prohibition, although the case may in other respects be within his jurisdiction; but prohibition will not lie in respect of a mere mistake made by a judge not amounting to an excess of jurisdiction (see *Jones v. Jones*, 1848, 17 L. J. Q. B. 170). In such cases, however, unless the judge has actually exceeded his jurisdiction, prohibition will not lie (see *Zohrab v. Smith*, 1848, *ibid.* 174; *Ex parte Rayner*, 1847, 17 L. J. C. P. 16; *Robinson v. Lenaghan*, 1848, 17 L. J. Ex. 174).

Among the various recent applications of the writ of Prohibition it may be mentioned that the writ has been granted to restrain proceedings in a County Court against a friendly society (*Jones v. Slee*, 1886, 32 Ch. D. (C. A.) 585), to restrain proceedings before a magistrate against a company for not forwarding to the Registrar of Joint-Stock Companies a list of members and summary sufficiently complying with the requirements of sec. 26 of the Companies Act, 1862 (see *In re Briton Medical and General Life Association*, 1888, 39 Ch. D. 61), and to restrain justices from hearing and determining an information against a postmaster under the Weights and Measures Act, 1878, for using a false scale supplied by the Post Office, on the ground that such an inquiry was not within the scope of the justices' jurisdiction (see *R. v. Justices of Bromley*, 1890, 38 W. R. 253).



*Ecclesiastical Courts.*—The principles upon which the superior Courts of common law proceed in exercising their jurisdiction as to granting a Prohibition to the Ecclesiastical Courts were reviewed in the case of *Veley v. Burder* (1841, 12 Ad. & E. 265). In that case Tindal, C.J., in his judgment in the Exchequer Chamber (*ibid.* pp. 311, 312), stated that “the first and largest class of cases in which Prohibitions have been granted by the Queen’s Courts at Westminster is where a plain and manifest excess of jurisdiction has appeared to have been claimed or exercised by the Ecclesiastical Court. The others are founded on the general principle that, notwithstanding the subject-matter is of ecclesiastical cognisance, the party would receive some wrong or injury by the course of proceeding in the Ecclesiastical Court, or be deprived of some benefit or advantage to which the common or statute law would entitle him. One class of these cases is, where such Court is proceeding to try a matter which is triable only by the common law; as a custom, prescription, or *modus*. Another, where, in a case of spiritual cognisance, a collateral question arises which is not properly of spiritual cognisance; in which case the Courts of common law oblige them to admit such evidence as the common law would allow (see *Breedon v. Gill*, 1697, 1 Raym. (Ld.) at p. 222), as when, for example, a lease is offered to be proved in an Ecclesiastical Court, and is rejected because by their law two witnesses are required; or, for the same reason, where the fact in dispute is the payment of a legacy. Another, where the spiritual Court takes upon itself the construction of statute law, and decides contrary to the construction which is put upon the statute by the temporal Courts. And lastly, another class of exceptions, which seems to apply itself more closely to the case before us, namely, that the spiritual Courts being always bound to declare the common law, when it becomes necessary to declare it, in the same manner as the common law Courts would do,—when, as in the present instance, the very groundwork and foundation of the proceedings of the spiritual Court is the holding of a supposed church rate to be a valid rate, which, upon the construction of a Court of common law, is held to be no rate at all. In such case, in order to prevent the conflict which would arise from a decision taking place one way in the spiritual Court and the opposite way in the Courts of common law, the prohibition is allowed to go” (see also per Lord Ellenborough, C.J., *Gould v. Gapper*, 1804, 5 East, at p. 371).

The jurisdiction with regard to prohibition of the Ecclesiastical Courts has been thus laid down in a later case. The temporal Courts cannot take notice of the practice of the Ecclesiastical Courts, or entertain a question whether in any particular cause, admitted to be of ecclesiastical cognisance, the practice has been regular. The only instances in which the temporal Courts can interfere by way of prohibiting any particular proceeding in an ecclesiastical suit are those in which something is done contrary to the general law of the land, or manifestly out of the jurisdiction of the Court (per Littledale, J., *Ex parte Smyth*, 1835, 3 Ad. & E. at p. 724).

The writ of Prohibition will therefore lie to the Ecclesiastical Courts to restrain proceedings by them in any case over the subject-matter of which they have no jurisdiction. It is not within the province of this article to examine the jurisdiction of the Ecclesiastical Courts, but it may be mentioned, by way of illustration, that it was provided by a statute of the reign of Edward I. that all pleas concerning rights to freehold, and all actions concerning, or for the recovery of, money, debts, and chattels (except so far as they related to wills and matrimony, in respect of which the Ecclesiastical Courts had jurisdiction until comparatively recently), and



all crimes, misdemeanours, and acts amounting to a breach of the peace, must be tried by the King's Courts. Prohibition, therefore, would lie to restrain any Ecclesiastical Court from taking cognisance of any such matter over which they have no jurisdiction (see 2 Coke, *Inst.* 600; Comyns, *Dig.* tit. "Prohibition" (F. 5); Bacon, *Abr.* tit. "Prohibition"; Fitzherbert, *Natura Brevium*, 40; Burn, *Ecclesiastical Law*, 9th ed., 1842, tit. "Prohibition").

*County Courts.*—Prohibition is available against a County Court judge in any case where he acts without jurisdiction or in excess of his jurisdiction. The jurisdiction of the County Courts is purely statutory, and is now defined by the County Courts Act, 1888, and by the rules made thereunder (see COUNTY COURTS; see also *Jones v. Currey*, 1851, 2 L. M. & P. 474; *Knowles v. Holden*, 1855, 24 L. J. Ex. 223; *Smith v. Pryse*, 1857, 7 El. & Bl. 339; *Brown v. Cocking*, 1868, L. R. 3 Q. B. 672; *Tomkins v. Jones*, 1889, 22 Q. B. D. 599).

When an order was made in a County Court action appointing a receiver to receive the interest of a sum in the hands of trustees, and ordering the trustees to pay a specific amount out of the interest to the receiver half-yearly until satisfaction of the judgment, it was held that, as it depended on the absolute discretion of the trustees whether anything should be paid to the judgment debtor, such an order for payment could not be made against the trustees, who were not parties to the action; and the County Court judge having exceeded his jurisdiction in making the order, the proper remedy was by prohibition (see *R. v. The Judge of the County Court of Lincolnshire*, 1887, 20 Q. B. D. 167). So where the judge of a Court had without jurisdiction ordered the high bailiff of a foreign County Court to pay damages to the plaintiff for negligence in levying an execution, which had been issued in the County Court, but was sent for execution to the foreign County Court, it was held that the high bailiff was entitled to a writ of Prohibition (*R. v. The Judge of the County Court of Shropshire*, 1887, 20 Q. B. D. 242).

Prohibition will not be granted to review the decision of the judge of a County Court where, on the face of the plaint, the subject-matter stated is clearly within his jurisdiction, but where the fact on which his jurisdiction depends rests upon conflicting evidence (see *Joseph v. Henry*, 1850, 1 L. M. & P. 388). But where there is no conflict of evidence, and by reason of an erroneous decision in point of law the judge has exercised a jurisdiction which does not by law exist, prohibition should issue (see per Cockburn, C.J., *Elstone v. Rose*, 1868, 9 B. & S. at p. 513).

And where a judge of an inferior Court purports to give himself jurisdiction by misconstruing an Act of Parliament, the superior Courts will interfere by prohibition; and on the same principle a County Court judge cannot give himself jurisdiction by wrongly construing a document (see per Pollock, B., *R. v. The Judge of the County Court of Lincolnshire*, 1887, 20 Q. B. D. at p. 170).

On the other hand, a Prohibition to a County Court judge will always be refused in cases where he is acting within his jurisdiction.

In a recent case, for instance, the judge of a County Court having jurisdiction in winding-up companies made an order of committal for disobedience of an order made by him in the course of the winding-up of a company. An application being made for a Prohibition to him on the ground that he had not jurisdiction to make the order for committal, it was held that, he being invested for the purposes of the winding-up jurisdiction with the powers of the High Court, a Prohibition could



not be granted (*In re The New Par Consols Ltd.* (No. 2), [1898] 1 Q. B. 669).

And a Prohibition will not lie to a County Court judge who has granted a new trial on the ground of the misconduct of the jury, although there was no evidence to warrant him in so doing, if the subject of the suit and the application for a new trial were within his competence and jurisdiction (see *R. v. The County Court Judge of Greenwich*, 1888, 37 W. R. (C. A.) 132).

*Personal Interest of Judge.*—A judge of an inferior Court will, on a similar principle, be prohibited from taking cognisance of any case in which he is personally interested.

It is a leading principle of English law that no one is allowed to be a judge in his own case; in other words, the least pecuniary interest in the subject-matter of the litigation will disqualify any person from acting as a judge (see per Stephen, J., *R. v. Farrant*, 1887, 20 Q. B. D. at p. 60; see also *Dimes v. The Proprietors of the Grand Junction Canal*, 1852, 3 H. L. 759). So any order made by a magistrate in a matter in which he has any direct pecuniary interest is voidable (see *R. v. The Recorder of Cambridge*, 1857, 8 El. & Bl. 637). And where a judge or magistrate has any such substantial interest in the subject-matter of the litigation as to make it likely that he has a bias in the matter, though it be not a pecuniary interest, he is disqualified from acting in the case (see *Anonymous*, 1698, 1 Salk. 396; per Blackburn, J., *R. v. Rand*, 1866, L. R. 1 Q. B. at p. 232; *R. v. Meyer and Others*, 1875, 1 Q. B. D. at p. 177; *R. v. Handsley*, 1881, 8 Q. B. D. at p. 387). On the other hand, where a magistrate has not such a substantial interest in the result of the hearing as to make it likely that he would have a bias, he will not be disqualified from taking part in the decision of a case (see the cases last referred to). So the fact that a magistrate has been subpoenaed, and it is intended to call him as a witness at the hearing, is not a legal disqualification from sitting; and the High Court will not, on that ground, grant a Prohibition to the magistrate from sitting (see *R. v. Farrant*, 1887, 20 Q. B. D. 58).

*Action against Foreign Sovereign.*—The writ of Prohibition is available to prevent an action or any legal proceedings in an English Court against a foreign sovereign who has not submitted to the jurisdiction (see *De Haber v. The Queen of Portugal*, *Wadsworth v. The Queen of Spain*, 1851, 17 Q. B. 171), for a foreign sovereign cannot be sued in the English Courts for acts done by him in his sovereign capacity in his own country (see *The Duke of Brunswick v. The King of Hanover*, 1848, 2 H. L. 1); and in respect of acts done in this country, the Courts have no jurisdiction over an independent foreign sovereign, unless he submits to the jurisdiction (see *Mighell v. Sultan of Johore*, [1894] 1 Q. B. (C. A.) 149).

*Judicial Proceedings.*—Prohibition, however, lies only to restrain judicial proceedings. It is a rule, therefore, that proceedings which are not of a judicial character will not be restrained by Prohibition (see *Ex parte Death*, 1852, 18 Q. B. 647; see also *In re The Local Government Board*, *Ex parte The Commissioners of Kingstown*, 1885, 16 L. R. Ir. Q. B. 150). Nor will prohibition lie to restrain any act or proceedings belonging to the executive government (see *Chabot v. Viscount Morpeth and Others, Commissioners of Woods and Forests*, 1850, 15 Q. B. 446).

There must, indeed, be some suit or proceedings actually pending, for



it has been laid down that the Court will not grant a Prohibition *quia timet* (see *Hill v. Bird*, 1672, Aleyn, 56).

*Wrong Decision of Inferior Court.*—It is an important and well-established principle that an erroneous decision, or the improper admission or rejection of evidence by any inferior Court, excepting the Ecclesiastical Courts, will not afford ground for a Prohibition. The use of the writ of Prohibition is to prevent inferior tribunals acting without authority, and not to remedy improper decisions to which they may come (see per Parke, B., *In re Burnford*, 1848, 12 Jur. 361). The judgment of an inferior Court, however erroneous it may be, is binding until it is reversed on appeal. But the rule with regard to the spiritual Courts is different, for the judges of those Courts do not act according to the common law (see per Coltman, J., *Ex parte Rayner*, 1847, 17 L. J. C. P. 16). In such Courts, where a decision in a temporal matter is given which conflicts with the rules of the common law, if a statute is misconstrued, or if the common law rules of evidence are deviated from, a Prohibition may be granted (see per Lord Mansfield, C.J., *Full v. Hutchins*, 1776, 2 Cowp. at p. 423; *Juxon v. Byron*, 1672, 2 Lev. 64; *Bastard v. Stukely*, 1677, *ibid.* 209; *Shotter v. Friend*, 1689, 2 Salk. 547; see also Comyns, *Dig. tit. "Prohibition"*).

If the Court below have jurisdiction over the subject, but are mistaken in their judgment, it is no ground for a Prohibition, but is only matter of appeal (see *Lord Camden v. Home*, 1791, 4 T. R. at p. 397).

As a general rule, therefore, the writ of Prohibition, being a prerogative remedy, will not be granted in cases where another sufficient remedy by appeal exists. For instance, appeal, and not prohibition, would be the proper remedy for an erroneous decision as to a matter of ecclesiastical procedure, where no statutory provision is violated by the Ecclesiastical Court (see *Mackonochie v. Lord Penzance*, 1881, 6 App. Cas. 424). So a Prohibition to the Divorce Court was refused on the ground that the question should be disposed of on appeal (see *Forster v. Forster and Berridge*, 1863, 4 B. & S. 187). And where there is an appeal from the ruling of a County Court judge, that is the defendant's proper remedy, and an application by him for a Prohibition against the issue of execution on the judgment will not be granted (see *Barker v. Palmer*, 1881, 8 Q. B. D. 9).

*Waiver.*—In cases where it does not appear upon the face of the proceedings that the inferior Court have no jurisdiction, a defendant, by allowing the Court to proceed without making any protest or taking any objection, waives his right to subsequently obtain a Prohibition on the ground of any defect of jurisdiction (see *Buggin v. Bennett*, 1767, 4 Burr. at p. 2037; *Yates v. Palmer*, 1849, 6 D. & L. 283).

But where it appears upon the face of the proceedings that the Court below have no jurisdiction, a Prohibition may be issued at any time, either before or after sentence, because, in the words of Lord Mansfield, C.J., all is a nullity: it is *coram non judice* (*Buggin v. Bennett*, 1767, cited *supra*). Mere acquiescence does not give jurisdiction (see per Willes, J., *Mayor, etc., of London v. Cox*, 1867, L. R. 2 H. L. at p. 283).

Where an inferior Court has no jurisdiction from the beginning, a party by taking a step in the cause before it does not waive his right to object to the want of jurisdiction; but jurisdiction is sometimes contingent, in which case if the defendant does not by objecting at the proper time exercise his right of destroying the jurisdiction, he cannot do so afterwards (see per Erle, J., *In re Jones, Jones v. James*, 1850, 19 L. J. Q. B. 257).



Where the objection to the jurisdiction is one that can be waived, a defendant by appearing and contesting the action waives his right to object to the jurisdiction, and will not be entitled to a Prohibition (see *Yates v. Palmer*, 1849, 6 D. & L. 283). So where an action had been commenced in a County Court within the district of which the defendant had carried on business within six months before the commencement of the action, but did not dwell or carry on business at the time of commencing the action, and leave to sue in that Court had not been obtained, and the defendant appeared and the case was partly heard and then adjourned, and at the second hearing the defendant objected to the jurisdiction of the Court, it was held that the objection to the jurisdiction was one which could be waived, that the defendant had waived it, and consequently was not entitled to a Prohibition (*Moore and Another v. Gamgee*, 1890, 25 Q. B. D. 244). But where an action has been commenced in an inferior Court, the defendant does not by entering appearance not under protest and taking other steps waive his right to object to the jurisdiction so soon as he ascertains exactly what the nature of the plaintiff's claim against him is (see *Lee v. Cohen*, 1895, 71 L. T. (C. A.) 824).

*Jurisdiction when Discretionary.*—For a long time there was great uncertainty and considerable divergence of opinion as to whether the grant of a writ of Prohibition was discretionary, or whether it was demandable as of right.

It is now clearly settled that in cases where a total absence of jurisdiction is apparent on the face of the proceedings in an inferior Court, the Court is bound to issue a writ of Prohibition, notwithstanding that the applicant for the writ has consented to or acquiesced in the exercise of jurisdiction by the inferior Court (see *Farquharson v. Morgan*, [1894] 1 Q. B. (C. A.) 522; see also *Buggin v. Bennett*, 1767, 4 Burr. 2037; *Yates v. Palmer*, 1849, 6 D. & L. 283). Upon an application for a writ of Prohibition being made in proper time, upon sufficient materials, by a party who has not by misconduct or laches lost his right, its grant or refusal is not in the mere discretion of the Court (see *Mayor, etc., of London v. Cox*, 1867, L. R. 2 H. L. at p. 279).

On the other hand, where the defect in the jurisdiction of the inferior Court is not apparent and depends upon some fact in the knowledge of the applicant, which he had an opportunity of bringing forward in the Court below, and he has thought proper without excuse to allow that Court to proceed to judgment without setting up the objection and without moving for a Prohibition in the first instance, although it would seem that the jurisdiction to grant a Prohibition in respect of the right of the Crown is not taken away, for mere acquiescence does not give jurisdiction, yet considering the conduct of the applicant, the importance of making an end to litigation, and that the writ though of right is not of course, the Court would decline to interpose, except, perhaps, upon an irresistible case, and an excuse for the delay, such as disability, malpractice, or matter newly come to the knowledge of the applicant (see per Willes, J., *Mayor, etc., of London v. Cox*, 1867, L. R. 2 H. L. at p. 283; see also *Knowles v. Holden*, 1855, 24 L. J. Ex. 223; *Broad v. Perkins*, 1888, 21 Q. B. D. at p. 534; *Farquharson v. Morgan*, [1894] 1 Q. B. at p. 558).

The granting of a writ of Prohibition to an inferior Court that has exceeded its jurisdiction is, therefore, in many cases, discretionary (see *Broad v. Perkins*, 1888, 21 Q. B. D. 533). Upon this principle a Prohibition to the Mayor's Court which had exceeded its jurisdiction was



refused where the application for the writ of Prohibition was made after judgment but before execution (*ibid.*).

From the recent cases, therefore, it is clear that the issue of the writ of Prohibition is not obligatory in every case of an excess of jurisdiction on the part of an inferior Court; and in explanation of this it has been pointed out that "the original groundwork of the jurisdiction in prohibition has undergone modification by the decisions of recent times. The Courts have ceased to look solely to the necessity of guarding the royal prerogative from encroachment, and have had regard rather to the right of the subject to be protected from the process of inferior Courts in matters out of their province. It is from this point of view only that any person can be said to have a right to a Prohibition, or that laches, acquiescence, or misconduct can be said to disentitle him to the aid of the superior Court; language wholly inappropriate, and considerations wholly irrelevant, if the matter is viewed solely from the point of view of the Crown and its rights" (see Shortt on *Informations, Mandamus, and Prohibition*, 1887, pp. 445, 446).

*Partial Prohibition.*—It should be mentioned that a partial Prohibition, or a Prohibition *quoad*, as it has been termed, may be granted to an inferior Court. Thus where an inferior Court acts within its jurisdiction as to part of a suit, but exceeds its jurisdiction as to part, a Prohibition, though moved for as a whole, may issue as to the part in excess (see Comyns, *Dig. tit. "Prohibition"* (F. 17); *Lush v. Webb*, 1665, 1 Sid. 251; *South-Eastern Rwy. Co. v. The Railway Commissioners and the Mayor, etc., of Hastings*, 1881, 6 Q. B. D. 586).

*Injunction in lieu of Prohibition.*—One of the main objects of the Judicature Acts is to enable the Court to decide, if possible, in one proceeding all the questions in dispute in the same matter and between the same parties; and to that end the Court is empowered to grant an injunction in all cases in which it may appear to the Court to be just and convenient (see Judicature Act, 1873, s. 24 (7); *ibid.* s. 25 (8)). That being so, and every judge of the High Court having by virtue of the Judicature Acts jurisdiction to grant prohibition, the Court may, in any case in which it has power to grant prohibition, grant an injunction to restrain the proceedings in the inferior Court (see *Hedley v. Bates*, 1880, 13 Ch. D. 498). An injunction has, for example, been granted to restrain a landowner from taking proceedings before justices of the peace on an irregular notice under the Land Drainage Act, 1861 (*ibid.*). In that case the magistrates had no jurisdiction unless a certain notice was given, and the question was whether a valid notice had been given or could be given. The decision proceeded on the principle that when the whole matter is before the Court in the first instance, and the Court has power to decide whether the magistrates had jurisdiction, it is much more convenient, instead of granting a Prohibition, to grant an injunction between the same parties. The whole doctrine laid down in *Hedley v. Bates* was dependent on the fact of the Court having a case to try within its undoubted jurisdiction over and above the question which the magistrates could decide (see per Jessel, M. R., *Stannard v. Vestry of St. Giles, Camberwell*, 1882, 20 Ch. D. (C. A.) at p. 196). On the other hand, when the Legislature has pointed out a special tribunal for determining a question, as a general rule proceedings before it will not be restrained by injunction (*ibid.*; see also *Great Western Rwy. Co. v. Waterford and Limerick Rwy. Co.*, 1881, 17 Ch. D. 493), the only exception being, as is indicated above, that where the question has come before another



Court in independent proceedings, in which it is necessary to decide the whole matter between the parties, the Court may in such case restrain the proceedings elsewhere by injunction (see *Stannard v. Vestry of St. Giles, Camberwell*, 1882, 20 Ch. D. 190).

PROCEDURE TO OBTAIN PROHIBITION.—*Application for Writ of Prohibition.*—Where the Court to which the Prohibition has to go has no jurisdiction, a Prohibition may be granted upon the request of a stranger as well as of the defendant himself (see 2 Coke, *Inst.* 607; Comyns, *Dig.* tit. "Prohibition" (E.); per Lord Campbell, C.J., *De Haber v. Queen of Portugal*, 1851, 17 Q. B. at p. 214). The reason is that where an inferior Court exceeds its jurisdiction it is chargeable with a contempt of the Crown as well as a grievance to the party (*ibid.*; see also *Ede v. Jackson*, Fort. 345); therefore the Queen's Bench, vested with the power of preventing all inferior Courts from exceeding their jurisdiction to the prejudice of the Queen and her subjects, is bound to interfere when duly informed of such an excess of jurisdiction (see per Lord Campbell, C.J., 17 Q. B. at p. 214). But a party to proceedings on the Crown side of the Queen's Bench Division for Prohibition cannot be admitted to proceed as a pauper (*Mulleneisen v. Coulson*, 1888, 21 Q. B. D. 3). And applications by strangers are not now encouraged (see Short and Mellor, *Cr. Off. Pr.* at p. 82), the granting of prohibition being a matter of discretion (see *Broad v. Perkins*, 1888, 21 Q. B. D. 533).

The application for prohibition should be made without delay, as soon as the inferior Court has acted in excess of its jurisdiction. The general rule is that, when the want of jurisdiction does not appear on the face of the proceedings, a writ of Prohibition will not be granted after judgment (see per Channell, B., *Denton v. Marshall*, 1863, 32 L. J. Ex. at p. 91; see also *In re Poe*, 1833, 5 Barn. & Adol. 681).

The application is usually made against the judge of the inferior Court, and also against the other party to the suit in that Court.

An application for a writ of Prohibition on the Crown side must be made by motion to a Divisional Court for an order *nisi* in all criminal causes or matters; and in civil proceedings on the Crown side by motion for an order *nisi*, or by summons before a judge at chambers (C. O. R. 1886, r. 81). No summons to show cause before a judge at chambers is to be issued for a writ of Prohibition without the leave of a judge upon an *ex parte* application (*ibid.* r. 305). The application must be supported by affidavits. As to the affidavits used in support of an application on the Crown side for a Prohibition, see *R. v. Plymouth and Dartmoor Rwy. Co.*, 1889, 37 W. R. 334.

It was provided by the R. S. C. of 1888 that every application for a Prohibition to a County Court, other than an application by the Attorney-General, must be brought by notice of motion served on the parties to the proceedings in the County Court, or such of them as may not be applicants for the Prohibition (see Order 59, r. 8a). The effect of this rule is that an applicant for a writ of Prohibition has the option to proceed either before a judge at chambers or in open Court; but if the applicant adopts the latter alternative he must proceed by notice of motion instead of applying for an order *nisi* under the former practice (see *King v. The Charing Cross Bank*, 1889, 24 Q. B. D. 27).

Under the County Courts Act, 1888 (51 & 52 Vict. c. 43, s. 127), any judge of the High Court may hear and determine applications for writs of Prohibition to any County Court, as well during the sittings as in vacation,



and may make such orders for the issuing of such writs as might have been made by the High Court. Sec. 128 of the same Act provides that when an application is made to the High Court or a judge thereof for a writ of Prohibition, addressed to any County Court, the matter is to be finally disposed of by order, and no declaration or further proceedings in prohibition are to be allowed. Upon any such application the judge of the County Court is not to be served with notice thereof, and is not, except by the order of a judge of the High Court, to be required to appear or to be heard thereon, and is not, except by such order, to be liable to any order for the payment of the costs thereof; but the application is to be proceeded with, and heard in the same manner in all respects as any case of an appeal duly brought from a decision of a judge, and notice thereof must be given to or served upon the same parties as in any case of an order made or refused by a judge in a matter within his jurisdiction, as the case may be.

† In cases where there is any doubt as to whether the writ of Prohibition should be granted, the Court may direct pleadings as in an ordinary action (see the Statute 1 Will. iv. c. 21, s. 1, an Act to improve the Proceedings in Prohibition and Writs of Mandamus, which is now repealed by the Statute Law Revision Act, 1891, 54 & 55 Vict. c. 67). An appeal being available since the Judicature Acts, it is now unusual to order pleadings in a case of prohibition (see *Toomer v. London, Chatham, and Dover Ry. Co.*, 1877, 2 Ex. D. at p. 458; *Serjeant v. Dale*, 1877, 2 Q. B. D. at 568). Where, however, pleadings in prohibition are ordered, the pleadings and subsequent proceedings, including judgment, and assessment of damages, if any, are to be as nearly as may be the same as in an ordinary action for damages (see R. S. C. 1883, Order 68, r. 3; C. O. R. 1886, r. 137; see also PLEADINGS).

† The order for the writ of Prohibition may be made absolute *ex parte* in the first instance in the discretion of the Court or judge (C. O. R. 1886, r. 82).

*Form of Writ of Prohibition.*—The form of writ of Prohibition contained in the Appendix to the Crown Office Rules, 1886 (Form 39), is as follows:—

#### WRIT OF PROHIBITION.

VICTORIA, by the Grace of God, etc., to [*the-keepers of Our peace and Our justices assigned to hear and determine divers crimes, trespasses, and other offences committed within Our county of* ], greeting.

Whereas We have been given to understand that you, the said [*justices have entered an appeal by A. B. against, etc.*]. And that the said has no jurisdiction to hear and determine the said by reason that [*here state facts showing want of jurisdiction*].

We therefore hereby prohibit you from further proceeding in the said

Witness, etc.

This writ was issued by, etc.

The rules as to the preparation, testing, and issuing of the writ of Prohibition are the same as in the case of Mandamus (see MANDAMUS).

† *Stay of Proceedings.*—The grant by the High Court or by any judge of an order or summons to show cause why a writ of Prohibition should not



issue to any County Court is, if so directed, to operate as a stay of proceedings in the action or matter to which the same relates until the determination of an order or summons, or until the High Court or a judge thereof otherwise order; and the County Court judge is from time to time to adjourn the trial of such action or matter to such day as he may think fit, until such determination or until such order be made; but if a copy of such order or summons is not served by the party who obtained it on the opposite party and on the registrar two clear days before the day fixed for the trial of the action or matter, the judge may in his discretion order the party who obtained the order or summons to pay all the costs of the day, or so much thereof as he thinks fit, unless the High Court or a judge thereof have made some order respecting costs (County Court Act, 1888, s. 129).

*Appeal.*—Before the modern system of appeal was introduced, in cases where the writ of Prohibition had been issued without due cause, a writ termed a Consultation might be granted. A Consultation was a writ in the nature of a writ of Procedendo, ordering the inferior Court to proceed with the cause notwithstanding the prohibition; it was introduced by the *Statutum de Consultatione* of the reign of Edward I., and although originally applicable only to the Ecclesiastical Courts, it was extended to all Courts of inferior jurisdiction. For further information as to the old writ of Consultation, see *Registrum Brevium*, 1634, pp. 44–58; Fitzherbert, *Natura Brevium*, tit. “Writ of Consultation,” pp. 50 *et seq.*; Comyns, *Dig.* tit. “Prohibition” (K.), “Consultation.”

Under the earlier practice there was no appeal, and the party asking for prohibition could move for prohibition in one Court, and if refused he could renew his application in another Court, and so go from Court to Court, as in the case of the other prerogative writs. Now, however, by the Judicature Act of 1873, s. 19, a right of appeal from every order or judgment of the High Court is given, consequently the reason for the multiplication of applications to co-ordinate Courts is gone, there being a right of appeal from the first refusal to grant the writ (see per Esher, M. R., *The Recepta*, [1893] Prob. (C. A.) at p. 261). An appeal lies from the decision of a Divisional Court granting a Prohibition to a County Court (see *Barton v. Titmarsh*, 1880, 49 L. J. Q. B. 573). And it has been held that an appeal lies to the Court of Appeal from a refusal to grant a writ of Prohibition, notwithstanding sec. 132 of the County Courts Act, 1888, which only applies to proceedings in the High Court, and prevents an application to another judge of the High Court or to another Divisional Court when the first judge or Court has refused to grant the writ (*ibid.*, [1893] Prob. (C. A.) 255; see also *Lister v. Wood*, 1889, 23 Q. B. D. (C. A.) 229). A further appeal lies from the decision of the Court of Appeal to the House of Lords (see APPEALS).

Order 58 of the R. S. C. 1883 as to appeals applies to all civil proceedings on the Crown side, including prohibition (see C. O. R. 1886, r. 216).

The County Courts Act, 1888, s. 132, provides that when the High Court or a judge thereof have refused to grant a Prohibition to a County Court no other Court or judge may grant such writ; but that provision is not to affect the right of appealing from the decision of the judge of the High Court to the High Court itself, or to prevent a second application being made for such writ to the High Court or a judge thereof on grounds different from those on which the first application was founded.



*Costs.*—With regard to the jurisdiction of the Queen's Bench Division to give costs on an order for a Prohibition, it has been held that the right to grant prohibition, not being a jurisdiction belonging exclusively to the Crown side of the Queen's Bench Division, but the Court of Exchequer, the Court of Common Pleas, and the Court of Chancery also having had concurrent jurisdiction and power to inhibit inferior tribunals, the High Court in making a rule absolute for a Prohibition without pleadings may make an order for costs (see *R. v. The Justices of the County of London and the London County Council*, [1894] 1 Q. B. (C. A.) 458; see also *Wallace v. Allen*, 1875, L. R. 10 C. P. 607; *R. v. Midland Rwy. Co.*, 1887, 19 Q. B. D. 540; *Great Western Rwy. Co. v. Waterford and Limerick Rwy. Co.*, 1881, 17 Ch. D. (C. A.) 493).

Under the County Courts Act, 1888, s. 130, where a writ of Prohibition has been granted to a County Court by the High Court or a judge thereof on an *ex parte* application, the party who obtained it must lodge it with the registrar, and give notice to the opposite party that it has issued two clear days before the day fixed for the trial of the action or matter to which it relates, otherwise the judge may, in his discretion, order the party who obtained the writ to pay all the costs of the day, or so much thereof as he shall think fit, unless the High Court or a judge thereof has made some order respecting such costs.

[*Authorities.*—Coke, *Institutes*, pt. ii. tit. "*Articuli Cleri; Registrum Brevium*," 1634, tit. "*Prohibitiones*"; Fitzherbert, *Natura Brevium*, tit. "*Prohibition*"; Comyns, *Digest*, tit. "*Prohibition*"; Bacon, *Abridgment*, tit. "*Prohibition*"; Burn, *Ecclesiastical Law*, 9th ed., 1842, tit. "*Prohibition*"; Lloyd, *Law of Prohibition*, 1849; Shortt on *Informations, Mandamus, and Prohibition*, 1887.]

**Pro indiviso**—For an undivided part; a phrase used in reference to lands, the occupation of which is joint-tenancy, in coparcenary, or in common (Cowel).

**Projectile.**—See WAR.

**Projecting Signs.**—By sec. 69 of the Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), it is enacted that the "commissioners may give notice to the occupier of any house or building to remove or alter any porch, shed, projecting window, step, cellar, cellar door or window, sign, sign-post, sign-iron, show-board, window, shutter, wall, gate or fence, or any other obstruction or projection erected or placed, after the passing of the special Act, against or in front of any house or building within the limits of the special Act, and which is an obstruction to the safe and convenient passage along any street; and such occupier shall, within fourteen days after the service of such notice upon him, remove such obstruction, or alter the same in such manner as shall have been directed by the commissioners, and in default thereof shall be liable to a penalty not exceeding forty shillings; and the commissioners in such case may remove such obstruction or projection, and the expense of such removal shall be paid by the occupier so making default, and shall be recoverable as damages; provided always that, except in the case in which such obstructions



or projections were made or put up by the occupier, such occupier shall be entitled to deduct the expense of removing the same from the rent payable by him to the owner of the house or building."

The local authority are not obliged to give notice to the owner or occupier before passing a resolution to send him notice to remove a projection, but if he objects to their order, his proper course is to apply to the local authority to be heard, and lay his objections before them (*A.-G. v. Hooper*, [1893] 3 Ch. 483; see also *Goldstraw v. Duckworth*, 1880, 5 Q. B. D. 275).

**Projecting Structure.**—The L. B. A., 1894, s. 73, lays down rules concerning the projections from buildings. The section corresponds to sec. 26 of the M. B. A., 1855. If a projection from a house is an annoyance owing to its "projecting into, or being made in or endangering or rendering less commodious the passage along any street," power is given by 18 & 19 Vict. c. 120, s. 119, to the vestry or district board to require the owner or occupier of the house to remove it. See PROJECTING SIGNS.

**Projection.**—See PROJECTING SIGNS and PROJECTING STRUCTURE.

**Prolixity.**—See PLEADINGS, *Under the Judicature Acts*, III.

**Prolocutor**—An officer chosen from among themselves by the members of the Lower House of Convocation to represent or relate their opinions and resolutions to the Upper House, and thence also called *referendarius*; he further presides in the Lower House. A candidate has sometimes been recommended by the archbishop, whose order or leave is always given before the election, and the newly-elected prolocutor has to be presented for confirmation by the archbishops and bishops. A prolocutor must be elected at the beginning of every sitting of Convocation, and if a vacancy occurs in the office during the sitting, a new one must be elected. The prolocutor may appoint a deputy or deputies to act in his absence, but the archbishop must approve the appointment, and it is said that the leave of the Upper House ought to be obtained before it is made. See also CONVOCATION.

[*Authority.*—Phillimore's *Eccl. Law*, 2nd ed.]

**Prolongation (or Extension) of Patents.**—See PATENTS.

**Prolonged Examination.**—See ARBITRATION, vol. i. pp. 307, 308.

**Promise.**—See CONTRACT.

**Promissory Note.**—1. *Definitions; Stamp.*—A promissory note is an unconditional promise in writing made by one person to another,



signed by the *maker*, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money, to, or to the order of, a specified person, or to bearer (s. 83). This definition is taken from the Bills of Exchange Act, 1882, from which the sections referred to below are also taken. Such a promise to pay to the maker's own order becomes a promissory note only when it is indorsed by the maker (s. 83 (2)). The note may contain also a pledge of a collateral security, and authority to sell or dispose of the pledge (s. 83 (3); *Venables v. Baring*, [1892] 3 Ch. 527, cited under NEGOTIABLE INSTRUMENT); but an instrument promising anything else in addition to payment of money is not a promissory note (*Follett v. Moore*, 1849, 4 Ex. Rep. 410; see also *Mortgage Corporation v. Commissioners of Inland Revenue*, 1888, 21 Q. B. D. 352). An instrument, otherwise in proper form, has been held not to be a promissory note because it contained a term as to giving time to sureties (*Kirkwood v. Smith*, [1896] 1 Q. B. 582). An instrument in the form of a bill of exchange without a drawee, accepted by the drawer, was treated as a promissory note in *Peto v. Reynolds* (1854, 9 Ex. Rep. 410). See further, the definition of a bill of exchange, vol. ii. p. 95.

A promissory note may be payable "after sight," *i.e.* exhibition to the maker for payment (*Holmes v. Kerrison*, 1810, 2 Taun. 323), or by instalments (ss. 9, 14).

A note may be made by two or more makers, and so as to make them jointly, or jointly and severally, liable. If it runs "I promise to pay," and is signed by two or more, the makers are jointly and severally liable (s. 85).

An *inland promissory note* is one which is, or on the face of it purports to be, both made and payable within the British Islands. Any other note is a foreign note (s. 83 (4); cp. vol. ii. pp. 95 and 106, and NEGOTIABLE INSTRUMENT, *Foreign Indorsement*).

*The Stamp Act*, 1891 (s. 33), for the purposes of that Act gives a wider definition to the name "promissory note," viz. "any document or writing (except a BANK NOTE) containing a promise to pay any sum of money," and whether simply or out of a particular fund, or upon a condition or contingency. This means an instrument containing substantially a promise to pay, and nothing else, and, therefore, does not include a contract of which a promise to pay money is only one term (*Mortgage Corporation v. Commissioners of Inland Revenue*, *supra*; *Brown & Co. v. The Commissioners*, [1895] 2 Q. B. 598), or a debenture, though unsecured (*British India Steam Navigation Co. v. The Commissioners*, 1881, 7 Q. B. D. 165), or an American railway bond (*Brown v. The Commissioners*, *supra*). As to rates of stamp duty and regulations as to stamping, see vol. ii. p. 107, and the Stamp Act. See below, 9.

2. *Application of Rules as to Bills of Exchange*.—A promissory note is a NEGOTIABLE INSTRUMENT (*q.v.*; 3 & 4 Anne, c. 9). It is substantially the same as a bill of exchange of which the drawer and acceptor are the same person (s. 5; cited vol. ii. p. 96, and *Peto v. Reynolds*, *supra*). The Act (s. 89) provides that, subject to the provisions of Part IV. thereof (which are set out in this article), its provisions relating to bills of exchange (summarised in vol. ii. p. 94) shall apply, with the necessary modifications, to promissory notes, the *maker* corresponding with the *acceptor*, and the *first indorser* of a note corresponding with the *drawer* of an accepted bill payable to the drawee's order.

As a note is in the position of an accepted bill when it is made, the provisions as to presentment for acceptance (vol. ii. p. 101), and acceptance



(*ibid.* p. 97), do not apply; nor do the provisions as to bills in a set (*ibid.* p. 106, s. 89 (3)).

3. *Delivery*.—A promissory note is inchoate until delivery to the payee or bearer (s. 84; cp. vol. ii. p. 98).

4. *Presentment for Payment; Time*.—Where a note payable on demand has been indorsed, it must be presented for payment within a reasonable time of the indorsement (see vol. ii. p. 102), or the *indorser* is discharged (s. 86). Where such a note is negotiated, it is not deemed to be overdue, for the purpose of affecting the holder with defects of title of which he had no notice, by reason that it appears that a reasonable time for presenting it had elapsed since its issue (s. 86 (3); *Glasscock v. Balls*, 1889, 24 Q. B. D. 13). The contrary is the case with a stale bill of exchange (s. 36 (3); vol. ii. p. 100).

5. *Presentment for Payment*.—This is necessary, in order to charge the *maker*, only if a place for payment is specified in the body of the note (s. 87 (1)). It is always necessary in order to charge the *indorser* (s. 87 (2)). For this purpose, where the note is, in the body of it, made payable at a particular place, presentment at that place is necessary, but where a place is indicated by way of memorandum only, presentment at that place, or elsewhere, suffices (s. 87 (3)).

6. *Liability of the Maker*.—The maker engages that he will pay the note according to its tenor. He is precluded from denying to a holder in due course (vol. ii. p. 99) the existence of the payee, and his then capacity to indorse the note (s. 88; cp. the liability of the acceptor of a bill, vol. ii. p. 104).

7. *Foreign Note*.—Where a foreign note is dishonoured, protest of it is unnecessary (s. 89 (4)). See PROTEST AND NOTING, and vol. ii. p. 104.

8. *Restrictions on Making Promissory Notes*.—A note to bearer for less than £20, payable on demand, must be made payable where it is issued (7 Geo. IV. c. 6). A note to bearer for more than 20s. and less than £5 is void (*semble*, Chalmers on *Bills of Sale*, 5th ed., p. 263; but *quære* the Act 17 Geo. III. c. 30 is wholly repealed by 26 & 27 Vict. c. 105). See further, BANK NOTE and BANK OF ENGLAND.

9. *Miscellaneous Points*.—A promissory note given to the trustee of an illegal society (*e.g.* an unregistered company) to secure a loan made to a member under the rules, is invalid (*Jennings v. Hammond*, 1882, 9 Q. B. D. 225; *Shaw v. Benson*, 1883, 11 Q. B. D. 563). A promissory note or bill of exchange may be made, accepted, or indorsed on behalf of a society under the Industrial and Provident Societies Act, 1893, if made, accepted, or indorsed in its name, or on its behalf, by its authorised agent (*ibid.* s. 33). The gift of a promissory note does not constitute the payee (and donee) a creditor of the maker (and giver) (*In re Whittaker*, 1889, 42 Ch. D. 119). A valid trust for the payee may be created by the delivery of a note by the maker to a third person, to be handed over to the payee on the maker's death (*In re Richards*, 1887, 36 Ch. D. 541). An insufficiently-stamped note is not admissible in evidence to prove receipt of the money on which it was given (*Ashling v. Boon*, [1891] 1 Ch. 568). In order to release a note without its cancellation or a written renunciation, it must be delivered up to the maker (s. 62; vol. ii. p. 105), or his *personal* representatives (*ibid.*; *Edwards v. Walters*, [1896] 2 Ch. 157). A written memorandum directing its destruction when found is not sufficient (*In re George*, 1890, 44 Ch. D. 625). See generally, BILLS OF EXCHANGE and NEGOTIABLE INSTRUMENT.

[*Authorities*.—Chalmers (5th ed.) and Byles (15th ed.) on *Bills of Exch.*].



**Promissory Oaths**—These are oaths of office. The subject is now regulated by the Promissory Oaths Act, 1868. See OATHS, vol. ix. at p. 250).

**Promoter**.—See COMPANY, vol. iii. at p. 182; PUBLIC COMPANY; TRAMWAY.

**Promulgation**.—Promulgation is a word used to express the Act of State by which the existence of new laws is brought to the knowledge of a nation. In most countries laws are promulgated by publication in the official gazette of the State (see TREATIES).

**Proof, Burden of**.—See BURDEN OF PROOF.

**Proper and Workmanlike**.—A covenant in a mining lease to work in “a proper and workmanlike manner” does not mean, *prima facie*, in such a manner only as shall be most advantageous for the lessor. It means *prima facie* in such a manner as shall not be simply an attempt to get out of the earth as much mineral as can be got for the particular purpose of the lessee, regardless of any ordinary or workmanlike proceeding (*Lewis v. Fothergill*, 1869, L. R. 5 Ch. 108).

**Proper Control**.—Under the Dogs Act (34 & 35 Vict. c. 56), s. 2, a Court of summary jurisdiction may order a dangerous dog to be destroyed, without giving the owner the option of keeping it under proper control (*Pickering v. Marsh*, 1874, 43 L. J. M. C. 143).

**Proper Custody**—Of documents, see Taylor on *Evidence*, 9th ed., by Pitt-Lewis, paragraphs 432-34, 659-63.

**Proper Entail**.—See Lewin on *Trusts*, 8th ed., p. 118.

**Proper Mixture**.—The defendant, who was the lessee of iron mines, ironworks, and furnaces, covenanted to work the furnace and ironworks effectually, unless prevented by repairs or unavoidable accident, or by the want of necessary materials, or unless the ironstone should be insufficient in quantity, or would not by itself, with a *proper mixture* and process in the manufacturing, make good common pig-iron. It was held that the meaning of this covenant was not that the “proper mixture” should be found upon the demised premises, but that it should be procured by the defendant (*Foley v. Addenbrooke*, 1844, 14 L. J. Ex. 169).

**Proper Name**.—See TRADE MARKS.



**Proper Party.**—By Order 11, r. 1, R. S. C., service out of the jurisdiction of a writ of summons, etc., may be allowed, etc., whenever “any person out of the jurisdiction is a *necessary or proper party* to an action properly brought against some other person duly served within the jurisdiction.” See SERVICE OUT OF THE JURISDICTION.

**Property.**—“Property is the most comprehensive of all terms which can be used, inasmuch as it is indicative and descriptive of every possible interest which the party can have” (per Langdale, M. R., in *Jones v. Skinner*, 1835, 5 L. J. Ch. 90).

“Property” is the generic term for all that a person has dominion over. Its two leading divisions are *Real* and *Personal*.

A gift by will of all the testator’s “property” will pass everything belonging to him at his death (or over which he had a general power; Wills Act, 1837, s. 27), whether real or personal property. It was decided in *Tyrone v. Waterford* (1860, 29 L. J. Ch. 486, per Knight-Bruce, L.J.), that a testamentary gift of “all my property in the county of N——” passed debts due to testator in respect of collieries in that county. In *Arnold v. Arnold* (1835, 4 L. J. Ch. 123) it was held that cash at banker’s, money in funds, arrears of pension, etc., will pass under a bequest of “£1000 to A. M., also my wines and property in England.” The word “property” is not, in such a bequest, limited to things *ejusdem generis*. In *Buchanan v. Harrison* (1861, 31 L. J. Ch. 74) it was held by Wood, V.C., that a gift of “personal estate and property whatsoever and wheresoever” did not pass real estate.

For the meaning of the word “property” under the Bankruptcy Act, 1883, see secs. 44 and 168 of the Act. It includes the pension of a retired civil servant (*In re Huggins*, 1882, 51 L. J. Ch. 935; see further, Stroud, *Jud. Dict.*).

**Property, Artistic.**—See ARTISTIC PROPERTY.

**Property, Industrial.**—See INDUSTRIAL PROPERTY.

**Property, Literary.**—See BERNE CONVENTION; COPYRIGHT.

**Property Qualification** for members of Parliament, abolished by 21 & 22 Vict. c. 26; for members of municipal corporations and local governing bodies, by 43 Vict. c. 17.

**Property Tax.**—See INCOME TAX.

**Proposals.**—See CONTRACT, vol. iii. p. 335. The term is also used in law in the sense of “suggestions,” *e.g.* the right of the next-of-kin to bring in “proposals” for committees of the persons and estates of lunatics.

**Proprietary Chapels.**—Unconsecrated proprietary chapels are anomalies unknown to the ecclesiastical constitution of England, and of



comparatively recent introduction. A minister officiating in one of them must obtain the bishop's licence, which may be revoked at any time, and cannot be granted without the consent of the incumbent of the parish (*Hodgson v. Dillon*, 1840, 2 Curt. 388); and a new incumbent can object to the licence, and prohibit the minister from officiating further. And such a minister is not a curate within the meaning of 1 & 2 Vict. c. 106 (*Richards v. Fincher*, 1874, L. R. 4 Ad. & Ec. 255). The bishop has no authority over such chapels (*ibid.*); and the proprietor may refuse to admit anyone, even the churchwarden of the parish, during divine service (*Bosanquet v. Heath*, 1860, 3 L. T. 290); but in the absence of proof of consecration, or of an agreement between incumbent, patron, and ordinary, no parochial duties, other than the performance of divine service for those who attend the chapel, can be performed by the minister; and he has no right to the alms received at the holy communion, or to any other money except pew rents (*Moysey v. Hillcoat*, 1828, 2 Hag. Ec. 30; and see *Trebec v. Keith*, 1742, 2 Atk. 498). Such a chapel may, at the will of the proprietors, be shut up, and, if unconsecrated, be converted to secular uses (*Moysey v. Hillcoat*, *ubi supra*). By 26 & 27 Vict. c. 82, 1863, the bishop of a Welsh-speaking diocese in Wales may, on the application of ten or more inhabitants, license for a term not exceeding two years a building as a chapel for the performance of divine service in English, and also a minister nominated by the incumbent to officiate therein; the applicants undertaking to provide the building and minister, and to pay all expenses.

If the incumbent refuse to nominate, or in case of any other disagreement about the minister or services, the bishop may nominate, subject to an appeal to the archbishop. The building is not to be a parochial chapel without the incumbent's consent, and the minister is not to have power to perform any pastoral functions other than those specified in his licence; and the rights of the incumbent as regards banns, marriages, funerals, and offertories are to remain unaffected. See also WALES.

[*Authority*.—Phillimore's *Eccl. Law*, 2nd ed.]

**Proprietary Medicines.**—See MEDICINE STAMPS.

**Proprietate probanda, Writ of**—A writ which used to be directed to the sheriff, requiring him to inquire whether goods distrained were the property of the plaintiff, or of the person claiming them. This writ issued when to a writ of replevin the sheriff returned as his reason for not executing it, that some third person claimed a property in the goods distrained. The object of this writ is now obtained by means of a summons to interplead.

**Proprietor.**—In a sale of land, the requirements of the Statute of Frauds are complied with if in the contract the vendor is described as "owner," "proprietor," "mortgagee," or by some equivalent term, though he is not named. But the terms "friend," "client" of a named person, or "solicitor to the vendor," are not sufficient, the reason being that the former description is a statement of a matter of fact, as to which there can be perfect certainty, and none of the dangers struck at by the Statute of Frauds can arise (*Jarrett v. Hunter*, 1886, 56 L. J. Ch. 141). Where on the sale of real estate by auction, the particulars state that the



property is put up for sale by "the proprietor," and no further description of the vendor is given in the particulars or conditions, there is a sufficient description of the vendor within the 4th section of the Statute of Frauds (*Sale v. Lambert*, 1874, 43 L. J. Ch. 470; and *Rossiter v. Miller*, 1878, 48 L. J. Ch. 10). Where a person was described as "a trustee selling under a trust for sale," the description was held to be sufficient to satisfy the Statute of Frauds (*Catling v. King*, 1877, 46 L. J. Ch. 384). Where a purchaser objected to the description of a vendor as "legal personal representative of L. D.," the vendor not being at the date of the contract L. D.'s legal personal representative, although he subsequently became so, it was held that the objection failed; that the latent ambiguity being raised by parol evidence could be got rid of by parol evidence, and that there was a valid contract. It was also held that the Statute of Frauds, if relied on, must be pleaded (*Towle v. Topham*, 1877, 37 L. T. 308. See also *Bourdillon v. Collins*, 1871, 19 W. R. 556; *Hood v. Lord Barrington*, 1868, L. R. 6 Eq. 218; *Potter v. Duffield*, 1874, 43 L. J. Ch. 472; *Commings v. Scott*, 1875, 44 L. J. Ch. 563).

By the Newspaper Libel and Registration Act, 1881 (44 & 45 Vict. c. 60), s. 1, "the word 'proprietor' shall mean and include as well the sole proprietor of any newspaper, as also in the case of a divided proprietorship the persons who, as partners or otherwise, represent and are responsible for any share or interest in the newspaper as between themselves and the persons in like manner representing or responsible for the other shares or interests therein, and no other person."

As to registration under the Patents, Designs, and Trade Marks Act, 1883, see *In re Guiterman*, 1885, 55 L. J. Ch. 309, and the Act. Sec. 61 of the P. D. & T. M. A. 1883, says: "The author of any new and original design shall be considered the proprietor thereof, unless he executed the work on behalf of another person for a good or valuable consideration, in which case such person shall be considered the proprietor; and every person acquiring for a good or valuable consideration a new and original design, or the right to apply the same to any such article or substance as aforesaid, either exclusively of any other person or otherwise, and also every person on whom the property in such design or such right to the application thereof shall devolve, shall be considered the proprietor of the design in the respect in which the same may have been so acquired, and to the extent, but not otherwise."

**Pro ratâ Freight.**—See FREIGHT.

**Prorogation**—The act of bringing a session of Parliament to an end. Prorogation quashes all proceedings except impeachments and appeals to the House of Lords. See PARLIAMENT, vol. ix. at p. 401.

**Prosecution.**—The term "prosecution" is now used as signifying the procedure for obtaining the adjudication of a Court of justice with respect to acts and omissions punishable by criminal or penal sanction; as "action" describes the procedure for obtaining civil remedies for the alleged infringement of civil rights.

There is not in England any complete system whereby the Crown or a public department undertakes all prosecutions; and subject to certain



statutory exceptions, it is the right of any private person to set the criminal law in motion without the interference of the Crown or any officer of the executive.

In the early history of the common law the distinction between civil and criminal remedies was not very clearly marked; and individuals injured by serious crime or their nearest relatives were able to proceed by way of APPEAL OF FELONY. On the gradual disuse and final abolition of such appeals, the theory was developed that it was the right of the subject to prosecute on behalf of the Crown for any criminal offence; and in the case of larceny, the owner of the stolen property was given a special inducement by obtaining a right to restitution of the goods on conviction of the thief.

In cases of treason or felony there appears to be an absolute duty incumbent on any person who knows or has strong reason to suspect the commission of an offence, to inform officers of the law of the fact or suspicion. See MISPRISION. And to stifle or compound a prosecution for such offences is misprision of treason or felony, or a misdemeanour corresponding to THEFT BOTE. See HUSH MONEY.

In the case of misdemeanour the duty to inform is not absolute; to compound a misdemeanour, while not criminal, unless it amounts to a conspiracy to defeat or pervert justice, is so far illegal that an agreement made on the composition is not enforceable (*Vint v. Windhill Local Board*, 1890, 45 Ch. D. 351).

And under the Prosecution of Offences Act, 1878, it is the duty of justices' clerks to inform the public prosecutor of all cases in which a prosecution is abandoned (see DIRECTOR OF PUBLIC PROSECUTIONS).

*Indictable Offences.*—There are three modes of instituting a prosecution for an indictable offence. The original method, which is still occasionally followed, is for the prosecutor to prepare a bill of indictment, and to send it, indorsed with the names of the witnesses to be called in support of it, before the grand jury for the Court of Assize or Quarter Sessions which has jurisdiction to try the charge. If a true bill is found, the person accused is either arrested on a BENCH WARRANT issued by the Court, or upon a warrant issued by a justice of the peace, or a certificate of the finding of the indictment, and on arrest is committed to prison to await his trial or held to bail to appear and take his trial (11 & 12 Vict. c. 42, s. 3).

An indictment thus presented is termed a voluntary indictment, the prosecutor being under no bond or recognisance to prosecute. It is forbidden as to all offences within the provisions of the Vexatious Indictments Acts, and is now rarely resorted to except in the case of indictments for nuisance, which are criminal in form only. Where prosecutions are undertaken by the direction of the Attorney-General or Solicitor-General, or by the permission of a judge of the High Court, or by the direction of a competent Court, as in the case of perjury or offences against bankruptcy or electoral law, it is open to the prosecution to proceed by voluntary indictment.

The mode of prosecution now usual and almost invariable is to take the person accused in the first instance before one or more justices, who hold a preliminary inquiry into the matters alleged against him. Prosecutions for treason and misprision and treason felony are now almost unknown, and are in practice only undertaken at the instance of the law officers of the Crown.

In the case of charges of felony, arrest being possible without warrant, it is usual for the prosecutor or the police, on his request, to arrest the accused, and take him with all convenient speed before a justice of the peace for the district in which he is arrested. When a magisterial Court



is not sitting, it is the practice to take the accused to a police station and charge him there, and then to detain him in custody or admit him to BAIL.

In all cases of indictable offences the prosecutor may adopt the procedure prescribed by the Indictable Offences Act, 1848, *i.e.* he may lay an information before a justice and obtain from him a warrant for the arrest of the accused, or a summons requiring his appearance at a time and place named, to answer the charge. The warrant or summons must be under the hand and seal of the issuing justice. The information need not be in writing or on oath, unless a warrant is asked for in the first instance; but where the defendant does not appear to a summons properly served, a warrant is issued on proof of service by oath (11 & 12 Vict. c. 42, ss. 1, 2, 8, 9; 42 & 43 Vict. c. 49).

In the city of London it is the practice to require a sworn information in writing on all applications for process in indictable cases, and any justice may insist on it wherever he thinks proper. Warrants can, but summonses cannot, be issued and executed on a Sunday (29 Chas. II. c. 7, s. 6; 11 & 12 Vict. c. 42, s. 4). The mode of executing warrants of arrest has been dealt with under ARREST. A summons must be personally served by a constable, or left at the last or most usual place of abode of the defendant with an adult person (11 & 12 Vict. c. 42, ss. 9, 12). It may be effected anywhere in England or Wales, and, after indorsement, in Scotland or Ireland (44 & 45 Vict. c. 24).

When the person accused of an indictable offence is before a justice, whether on arrest with or without warrant or on summons, the justice, irrespective of the question where the offence was committed, may hold an inquiry to determine whether the accused should or should not be sent for trial.

The procedure on the inquiry is as follows:—

The charge is stated to the accused, and counsel or solicitor for the prosecution or the prosecutor may open the facts. In certain special cases, officers of local authorities and factory inspectors are allowed to conduct cases in which they are not the actual prosecutors. The evidence for the prosecution is then taken on oath, subject to cross-examination by the accused or his counsel or solicitor, and is reduced into writing, and read over to and signed by the witness, when it becomes a deposition. The accused is then asked by the magistrate whether he has anything to say, and cautioned (see CAUTION), and asked if he has witnesses to call, or wishes to make a statement, or if a competent witness to give evidence.

The evidence for the defence is then taken like that for the prosecution, and the statement, if any, of the defendant written down.

The inquiry may be adjourned from time to time, and the accused committed to prison or admitted to bail; but a remand must not be for over eight days, except with a view to deciding whether the case shall be dealt with summarily.

In the case of those indictable offences which can be dealt with summarily, a petty sessional Court, after taking the necessary steps to ascertain whether it is legal or expedient to take this course, proceeds under the Summary Jurisdiction Acts.

In the case of those offences which are ordinarily the subject of summary jurisdiction, but may be dealt with on indictment at the election of the accused, the justices must, as a condition of their jurisdiction, inform the accused of his right to elect to be tried on indictment (42 & 43 Vict. c. 49, s. 17); and if he so elects, the subsequent proceedings are as for an indictable offence (*R. v. Cockshott*, [1898] 1 Q. B. 582).



On the completion of the preliminary inquiry, the justice determines whether there is or is not, on the evidence before him, a reasonable probability of the guilt of the accused. If he thinks there is, he commits the accused to prison to await his trial, or puts him on a recognisance of bail to take his trial, and binds over the prosecutor and the witnesses for the prosecution or defence, other than those to character only, to attend the Court of trial. If he thinks there is no case, he refuses to "commit for trial" (52 & 53 Vict. c. 63, s. 27). This refusal is no bar to prosecution by voluntary indictment, except where the Vexatious Indictments Act, 1859, applies. Where it does, the prosecutor may insist on being bound over to prosecute. This right attaches only where a preliminary inquiry has been held, and not where process has been asked for and refused.

If the magistrate refuses to take the recognisance, he may be compelled to do so by *mandamus*; or the prosecutor may obtain the leave of the Court where the trial ought to take place, or of a judge of the High Court (22 & 23 Vict. c. 17, s. 1), to prefer an indictment.

On committal for trial, or on binding over the prosecutor to prefer an indictment under the Act of 1859, it becomes the duty of the justice's clerk to return the depositions and statement of the accused, and the recognisances entered into, to the Court of trial.

Where the prosecution is instituted or taken over by the Director of Public Prosecutions, this procedure is varied to the extent already stated under the head DIRECTOR OF PUBLIC PROSECUTIONS.

A single justice can exercise all the powers given under the Indictable Offences Act, 1848; but proceedings are usually taken before a petty sessional Court or before a stipendiary magistrate, and in the Police Court districts of London are taken only before a police magistrate. The clerks of these paid functionaries have the same duties as the clerks of petty sessional divisions.

The place where the preliminary inquiry is held is not an open Court (11 & 12 Vict. c. 42, s. 19; and see *Boulter's case*, [1897] App. Cas. 556).

Where the offence was not committed within the jurisdiction of the justice before whom the accused is brought, he may either hold the preliminary inquiry and commit for trial in the proper jurisdiction, or if the accused has been arrested on a backed warrant, may send him under the warrant to the jurisdiction where it issued.

The proceedings in a prosecution for an indictable offence subsequent to committal are dealt with under INDICTMENT and TRIAL; and the proceedings on the inquisition of a coroner's jury, under CORONER.

*Costs of.*—Justices have no direct jurisdiction over the costs of a preliminary inquiry, but have the powers following: they may, on committal for trial, grant a certificate of the costs of a preliminary inquiry (including those of the witnesses for the defence in felony or misdemeanour), which, on production of the certificate, may be allowed by the Court of trial (7 Geo. IV. c. 64, s. 22; 14 & 15 Vict. c. 55, s. 5; 30 & 31 Vict. c. 35, s. 5); and under a temporary Act (29 & 30 Vict. c. 52) continued by 60 & 61 Vict. c. 54, a justice, on dismissal of a charge for any of the offences there scheduled, may grant a certificate for costs if the charge was made in good faith, and in the case of a felony with reasonable and probable cause; and on its production a Court of Quarter Sessions may allow costs not exceeding the amount certified. This subject has been more fully dealt with under the title COSTS in *Criminal Cases*.

[*Authorities.*—Archbold, *Cr. Pl.*, 21st ed.; Atkinson, *Magistrates' Annual Practice*, 1897; Oke, *Magisterial Synopsis*.]



## OFFENCES PUNISHABLE SUMMARILY.

The right of an individual to prosecute offences punishable summarily is the same as in the case of indictable offences; but there are more statutory exceptions restricting the power of prosecution to public authorities concerned in administering particular branches of the law or persons aggrieved. The ordinary procedure is by information under the Summary Jurisdiction Acts, which has to a great extent superseded the former statutory remedies of informations under Penal Acts (see PENAL STATUTE).

The course of procedure with reference to these offences is dealt with under SUMMARY JURISDICTION.

Any person who institutes a criminal prosecution, even under authority of Government, is, if the prosecution fails, liable to an action for MALICIOUS PROSECUTION, if the prosecution was instituted maliciously and without reasonable and probable cause (see MALICIOUS PROSECUTION). The responsibility rests on the person who signed the charge-sheet, laid the information, or otherwise actively, and as a principal, and not merely as an agent or advocate, made the accusation; but does not fall on a person who merely informs officers of the law, who thereafter undertake the proceedings independently.

**Prosecutions, Public, Director of.**—See DIRECTOR OF PUBLIC PROSECUTIONS.

**Prospectus.**—See COMPANY.

**Prostitute; Prostitution.**—1. The English law does not treat prostitution as a crime *per se*. The history of the law on this subject is treated under FORNICATION.

Prostitution is, however, criminal when conducted so as to cause a public annoyance, or where persons engaged in the trade endeavour to debauch or corrupt chaste women or girls.

2. Annoyance in streets or places of public resort is dealt with as follows: (1) A Court of summary jurisdiction may punish as an idle and disorderly person every common prostitute wandering on the public streets or public highways, or any place of public resort, and *behaving in a riotous and indecent manner*, but not one merely soliciting (*R. v. De Ruiter*, 1880, 44 J. P. 90; 5 Geo. IV. c. 83, s. 3).

(2) Every common prostitute or night walker (*a*) loitering or being in any thoroughfare or public place in the Metropolitan Police District *for the purpose of prostitution or solicitation*, to the annoyance of the inhabitants or passengers (2 & 3 Vict. c. 47, s. 54 (11)); (*b*) loitering and importuning passengers (in urban districts outside that district) for the purpose of prostitution, to the obstruction, annoyance, or danger of the residents or passengers (10 & 11 Vict. c. 89, s. 28).

(3) It is also an offence, summarily punishable, for the holder of a liquor licence to knowingly permit his premises to be the habitual resort or a place of meeting of reputed prostitutes, whether the object of their so resorting or meeting is or is not prostitution; but he may allow them to remain long enough to obtain reasonable refreshment (35 & 36 Vict. c. 94, s. 15). Somewhat similar provisions are made, applying to all places of public resort for the sale



or consumption of refreshments; as to London, by 2 & 3 Vict. c. 47, s. 44, and as to other urban districts, by 10 & 11 Vict. c. 89, s. 35 (and see *Wilson v. Stewart*, 1863, 3 B. & S. 913), and as to all refreshment houses, by 23 & 24 Vict. c. 27, s. 32.

3. The keeping of houses for prostitution is dealt with under BROTHEL, vol. ii. p. 272.

4. The Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), creates the following misdemeanours, all punishable by imprisonment with or without hard labour for not over two years, and none triable at Quarter Sessions:—

(a) Procuring any girl or woman under twenty-one not being a common prostitute or of known immoral character to have unlawful carnal connection either within or without the Queen's dominions with any other person or persons;

(b) Procuring or attempting to procure any woman or girl to become either within or without the Queen's dominions a common prostitute;

(c) Procuring or attempting to procure any woman or girl to leave the United Kingdom with intent that she may become an inmate of a BROTHEL elsewhere;

(d) Procuring or attempting to procure any woman or girl to leave her usual place of abode in the United Kingdom (not being a brothel), with intent that she may, for the purposes of prostitution, become an inmate of a brothel within or without the Queen's dominions (48 & 49 Vict. c. 69, s. 2);

(e) The inducing or knowingly suffering by the owner or occupier of any premises, or persons having, or acting or assisting in, the management or control thereof, of any girl between thirteen and sixteen to be on the premises for the purpose of being carnally known by any person. If the girl is under thirteen, the offence is felony (48 & 49 Vict. c. 69, s. 6);

(f) Detention of women or girls (1) in a brothel, or (2) in any premises, with intent that they may be carnally known by any man (48 & 49 Vict. c. 69, s. 8; *R. v. Webster*, 1886, 16 Q. B. D. 134).

Parents or employers who permit or encourage seduction or prostitution of a girl under sixteen may be deprived of the custody of the girl (48 & 49 Vict. c. 69, s. 12).

5. Acts to prevent dissemination by prostitutes of contagious disease among soldiers existed from 1866 until 1886, when they were repealed (49 & 50 Vict. c. 10); and the diseases in question have not been included in the Infectious Diseases Notification Act, 1890, or Orders made thereunder.

**Protection Order.**—See DESERTION OF WIFE AND CHILDREN.

**Protection, Writ of.**—This writ was granted by the Crown of its grace to a subject to give him immunity from actions during its currency, but not for more than a year at a time, on the grounds therein stated. These are usually described as *quia profecturus*, i.e. going abroad on the king's service as ambassador or soldier, or *quia moraturus*, i.e. staying abroad on such service or imprisoned abroad while on such service. But protection was also given to Crown debtors to prevent private creditors from getting execution over their property in priority to the Crown. The writ was not granted in cases of felony, nor where the applicant was a prisoner under order of the Court applied to (3 Co. *Inst.* 240; and see 17 Edw. II. c. 6).

The writ was pleaded in abatement of any suit brought during its



currency, and allowed or disallowed by the Court accordingly. It was, as a general rule, invalid if granted after the commencement of the suit in which it was pleaded (13 Rich. II. st. 1, c. 16). The grant of the writ was very common during the Middle Ages, and the patent rolls are full of instances. Crusaders obtained it as of course. It continued in use till the end of the seventeenth century, and the last instance of its grant is said to have been to General Cutts (*Barrudale v. Cutts*, 1692, 3 Lev. 332). It had been peculiarly subject to abuse, as appears from the early statutes indexed under the title "Protection" in *Statutes of the Realm*, vol. ii. p. 687, and many Acts which created civil obligation or imposed penalties forbade protections or essoins to be cast in them (*e.g.* 2 & 3 Phil. & Mary, c. 7, s. 2).

The writ of protection was distinct from the procedure by ESSOIN, and the protection given was distinct from that acquired by privilege from arrest.

[*Authorities.*—Rolle, *Abr. sub voce* "Protection"; Vin. *Abr. sub voce* "Protection"; Com. Dig. "Abatement," F. 11; *Co. Litt.* 131; 3 Black. Com. 289.]

**Protectorate**—Originally the position of one State towards a less powerful one to which it lends its support.

Vattel says:—

A weak State which, in order to provide for its safety, places itself under the protection of a more powerful one, and engages in return to perform several offices equivalent to that protection, without, however, divesting itself of the right of government and sovereignty—that State, I say, does not on this account cease to rank among the sovereigns who acknowledge no other law than that of nations.

(*Law of Nations*, vol. i. 1, s. 6.) This is the sense in which, in Vattel's time, one State might be placed under the protection of another; it is very different from the sense at the present day of "protectorate," which has latterly become a name for the relationship between a suzerain and vassal State. A protectorate is seldom the outcome of a voluntary act on the part of the weaker State, but springs generally from an assumption of authority by a more powerful one, and it is often the first step to conquest, as in the case of Madagascar and some of our Asiatic possessions. Any authority exercised by one State within another, places the latter in a state of subjection; any right to control the foreign relations of another State, even as slight a one as in the case of the Transvaal, though not usually so described, is not essentially different in character from a protectorate. The late Mr. Hall, indeed, made control of the foreign relations of another State the criterion. "The term protectorate," he says, "is one of which the meaning is somewhat indefinite; or rather, perhaps, it may be said with more correctness to have different meanings in different circumstances. . . . A protectorate of the kind which used to be exercised by a European Power over a smaller civilised State is far from being identical with the relation which links an Eastern protected State or community with a European country; and a protectorate, as understood by the German Government, signifies the assumption of much fuller control than has seemed to Great Britain to be legitimate. So different, indeed, are the meanings of the word, that they can in truth be only said to have one element in common. In all cases a State or community under the protection of a European State has parted with freedom of action in foreign affairs" (*Foreign Jurisdiction*, p. 204).



Sir H. Maine takes a similar view:—

“The powers of sovereigns,” he observes, “are a bundle or collection of powers, and they may be separated one from another. Thus a ruler may administer civil and criminal justice, may make laws for his subjects and for his territory, may exercise power of life and death, and may levy taxes and dues, but nevertheless he may be debarred from making war or peace, and from having foreign relations with any authority outside his territory. This, in point of fact, is the exact condition of the native princes of India; and States of this kind are at the present moment rising in all the more barbarous portions of the world. In the protectorates which Germany, France, Italy, and Spain have established in the Australasian seas and on the coasts of Africa, there is no attempt made to annex the land or to found a colony in the old sense of the word; but the local tribes are forbidden all foreign relations, except those permitted by the protecting State. As was the declared intention of the most powerful founder of protectorates of this kind, Prince Bismarck, if they were to resemble anything, they were to resemble India under the government of the East India Company.”

(*International Law*, p. 58.) Protectorates over barbarous or imperfectly civilised countries which do not amount to full rights of sovereignty, but which are good as against other civilised States, so as to prevent occupation or conquest by them, and so as to debar them from maintaining relations with the protected States, differ from colonies, in that the protected territory is not an integral portion of the territory of the protecting State. They differ both from colonies and protectorates of the type existing within the Indian Empire, in that the protected community retains, as of right, all powers of internal sovereignty which have not been surrendered by treaty, or which are not needed for the due fulfilment of the external obligations which the protecting State has directly or implicitly undertaken by the act of assuming the protectorate (Hall, *International Law*, p. 130).

The position in time of war of a State under the protection of a belligerent Power might be a delicate one where the control exercised is slight, and the suzerain might obviously be forced by circumstances into annexation.

An attempt was made by the West African Conference of 1885 to secure the territories in question against hostilities between the contracting Powers by the insertion of an article in the Berlin General Act (see article 11), which provides that where a Power exercising rights of sovereignty or of protectorate in the territories to which the Act applies, and placed under the régime of freedom of trade, should be involved in war, the high signatory parties engaged themselves to afford their good offices in order to place the territories belonging to that Power, and comprised in the free-trade zone, under a neutral régime, and to cause it to be considered as belonging to a non-belligerent State, by the common consent of that Power and the other belligerent party or parties for the duration of the war.

[*Authorities*.—Engelhardt, *Les Protectorats anciens et modernes*, Paris, 1896; Despagnet, *Etude sur les protectorats*, Paris, 1896; Heilborn, *Das völkerrechtliche Protektorat*, Berlin, 1894; Wilhelm, “Théorie juridique des protectorats,” *Journal de Droit International Privé*, vol. xvii. p. 204, Paris, 1890; Catellani, *Ultimi Studi sul Protettorato*, Torino, 1897; Westlake, “L’Angleterre et la République sud-Africaine,” *Revue de Droit International*, 1896, p. 268; Stubbs, *Suzerainty, or the Rights and Duties of Suzerain and Vassal States*, London, 1882; Holtzendorff, *Handbuch des Völkerrechts*, vol. ii. s. 24, Hamburg, 1887; Hall, *Foreign Jurisdiction of the British Crown*, Oxford, 1894.]

**Protector of the Settlement.**—In order to effectually bar, by the old expedient of a recovery (*q.v.*), an estate tail not in actual



possession, and all remainders and other limitations not being prior to such estate, the person having the immediate freehold (called for this purpose the tenant to the *præcipe*) was a necessary party, and without his concurrence to the conveyance the recovery was void. The Fines and Recoveries Act, 1833 (3 & 4 Will. IV. c. 74), in abolishing fines and recoveries, and substituting more simple modes of assurance, substituted also for the consent of the old tenant to the *præcipe* that of the "Protector of the Settlement." It defines the protector of the settlement as the owner of the first existing estate under a settlement prior to the estate tail under the same settlement.

The estate of the protector within the above definition may be any estate for years determinable on the dropping of a life or lives, or any greater estate not being an estate for years. The "owner" means the substantial owner, *i.e.* the owner of the beneficial interest—"estate," by the constructive clause of the Act, being expressed to extend to an estate in equity as well as at law (*In re Dudson*, 1878, 8 Ch. D. 628),—the person entitled under the settlement to the beneficial enjoyment of the rents and profits. An estate by the curtesy (*q.v.*), in respect of the estate tail or any prior estate created by the same settlement, is a "prior estate" within the definition, and an estate by way of resulting use or trust to or for the settlor, is an estate under the settlement.

The powers of the protector remain unrestricted, even though his estate may have been charged or encumbered in any way, and whether by himself or the settlor, or otherwise, and the rents and profits exhausted or in part required for satisfying the encumbrances, etc. And even the actual alienation, voluntary or involuntary, of his estate, does not deprive him of or impair his power. When two or more persons are owners of the prior estate, each is to be sole protector of the settlement to the extent of his undivided share. As to married women, the Act says, "Where a married woman would, if single, be the protector of a settlement in respect of a prior estate which is not thereby settled or agreed, or directed to be settled to her separate use, she and her husband together shall in respect of such estate be the protector of such settlement, and shall be deemed one owner; but if such prior estate shall, *by such settlement*, have been settled or agreed or directed to be settled to her separate use, then, and in such case, she alone shall in respect of such estate be the protector of such settlement" (s. 24). It has been suggested by an eminent writer on real property, that perhaps the Married Women's Property Act does not have the effect of making the concurrence of the husband as protector unnecessary in any case in which it would have been necessary if the Act had not been passed, and the argument in support of this theory is based on the effect of the words of the section above underlined. But we apprehend that the proposition can no longer be maintained, in view of recent decisions that have practically declared that the Married Women's Property Act supplies the words "for her separate use" (per Lopes, L.J., in *In re Lumley, Ex parte Hood Barrs*, [1896] 2 Ch. 690).

Where a lease at a rent is created or confirmed by a settlement, the lessee is not in respect thereof to be protector of the settlement; nor is any doweress, heir, executor, or administrator or assign, in respect of any estate taken by her or him in such respective capacity. The same holds good of a bare trustee other than a bare trustee under a settlement made before the passing of the Act (*e.g.* a trustee to preserve contingent remainders who having the immediate estate of freehold would, before



the passing of the Act, have been the tenant to the *præcipe*). As to what is a *bare* trustee, see LEGAL ESTATE.

Where the owner of the prior estate is for any of the above reasons excluded, the person (if any) who would be, if such estate did not exist, becomes, protector of the settlement.

As to settlements existing before the passing of the Act, there are two important provisions to be noticed (ss. 29 and 30):—

1. Where the prior estate has before the 31st December 1833 been assigned absolutely or otherwise, the person who, but for the Act, would have been the proper tenant to the *præcipe*, in respect to, and by virtue of the estate conferred upon him, is to be the protector during the continuance of that estate.

2. Where a person having before the 31st December 1833 assigned absolutely or otherwise a reversion or remainder in fee of any lands, who would under the Act, and but for this clause have been qualified to be protector of the settlement, and enabled to concur in barring such reversion or remainder, which he could not have done without becoming such protector, then the person who, but for the Act, would have been tenant to the *præcipe*, is during the continuance of the estate conferring the right to make the tenant to the *præcipe* to be the protector of the settlement.

Both the clauses above summarised rendered it necessary in the cases provided for to find the owner of the immediate freehold in the old way, and were for the protection of the assignee or encumbrancer of the estate (see RECOVERIES).

We have dealt hitherto with a protector appointed by statute. The Act, however, gives to any settlor entailing lands, power to appoint by the settlement any person or persons *in esse*, but not exceeding three in number or being aliens, to be protector of the settlement in lieu of the statutory protector. The statutory protector may be one of such persons (11 Sim. 521), and provided that the number of persons constituting the protector shall never exceed three, the settlor may insert a power in the settlement of appointment of a person or persons, not being an alien or aliens, in the place of others dying or resigning; and the persons so appointed shall, if there be then no other protector, be the protector, or if there shall then be any other person as protector, joint-protector with such person.

Appointments of protectors must be by deed enrolled within six months, and so must the deed by which any protector relinquishes his office. If the persons originally constituting the protector shall all have ceased so to be, either by death or retirement, and there shall have been no other appointed to fill the vacancy, the statutory protector shall, unless otherwise directed by the settlor, act as sole protector. Where trustees of the real estate under a will were appointed also protectors of the estates tail created by the will, and they all died, and new trustees of the will were appointed by the Court, it was held nevertheless that the tenant for life had become protector of the settlement, and that he and the first tenant in tail could convey (*Clarke v. Chamberlin*, 1880, 16 Ch. D. 176). The consent of the survivor, or some one of several persons constituting the protector, is a sufficient consent of the protector to barring an entail as required by the Act (*Bell v. Holtby*, 1873, L. R. 15 Eq. 178).

*Disabilities, etc.*—If the protector is a lunatic or a person of unsound mind so found or not by inquisition, the Lord Chancellor is to be the protector (see as to the jurisdiction of the Court in Lunacy in this respect, the



Statutes 3 & 4 Will. IV. c. 74, ss. 33, 48, 49, and Lunacy Act, 1890, s. 128).

In other cases the Court of Chancery (*i.e.* now the Chancery Division of the High Court of Justice) is to be the protector. These are where the protector shall be convicted of treason or felony; where the protector being the person appointed by the settlor is an infant, or it is uncertain whether he be alive or dead. Further, if any settlor expressly in the settlement excludes the statutory protector without appointing another in his stead, then the Court is protector during the continuance of the "prior" estate as to the lands in which the prior estate subsists. Similarly in any other case where there shall be subsisting under a settlement an estate prior to an estate tail under the same settlement and such prior estate shall be sufficient to qualify the owner thereof to be protector of the settlement, and there shall happen at any time to be no protector of the settlement, the Court is protector so long as there is no other, and the prior estate subsists.

*Powers.*—Where there is a protector, his consent is requisite and indispensable to enable an actual tenant in tail to create any larger estate than a base fee (*q.v.*); and where an estate tail has been converted into a base fee, so long as there is a protector of the settlement by which the estate tail was created, his consent is requisite to the enlargement of the base fee.

Any attempt whatever to control the protector in giving or withholding his consent, and any agreement entered into by him to withhold such consent is void. On the other hand, without giving any opinion as to how far the Court would enforce specific performance of a contract by a protector of a settlement, it has been stated (by Cotton, L.J., in *Bankes v. Small*, 1887, 36 Ch. D. 716, at p. 724) that "if he contracted by deed, probably that would be such a consent as is required by the Act" (see *post*).

The protector is not in the eye of the law a "trustee" of his power of consent, and equity must not interfere or control the exercise of such power by alleging that it is a breach of trust or in any similar manner. The equitable doctrines as to fraud on powers, and the like rules as to dealings and transactions between the donee of a power and the object in whose favour such power is exercised, must not be applied to dealings and transactions between a protector and a tenant in tail on the occasion of the consent by the former to a disposition by the latter. The consent of the protector to a disposition, if such consent is to be valid, must be given, either by the same deed by which the disposition is effected, or if by a separate instrument, such instrument must be executed on or any time before the day of the date of the deed of assurance. In the case of a consent by a separate deed, it is to be deemed absolute and unqualified, unless the protector by express reference confines it to the particular assurance in question. The protector's consent is irrevocable.

A married woman protector, either alone or jointly with her husband, gives her consent in the same way as a *feme sole* (s. 46); and in the case of a husband who is a lunatic or under other disability, or has absconded or lives apart from his wife, his consent may be dispensed with by an order made in a summary way in the Court of Common Pleas (now the Queen's Bench Division) (*In re Caine*, 1883, 10 Q. B. D. 284); but this provision does not extend to the case of a married woman where, under the Act, the Lord Chancellor or the Chancery Division is protector of the settlement in lieu of the husband.

The consent, when given by a separate instrument, is void unless enrolled at or before the time of enrolling the assurance; the assurance must be enrolled within six months from its execution.



When the Lord Chancellor or the Court is protector, the consent is given on motion or petition by the tenant in tail, and no evidence of such consent, beyond the order of the Court in obedience to which the disposition has been made, is requisite. For an instance of a consent by the Court as protector, see *In re Sparrow*, 1882, 20 Ch. D. 320.

The Act expressly provides that Courts of Equity shall not give effect to dispositions by tenants in tail, or consents of protectors of settlements (as regards specific performance, supplying defects in execution and the like), which in Courts of law would be ineffectual. The case of *Bankes v. Small*, *ubi supra*, has been already noticed in connection with an *obiter dictum* as to a contract by the protector to give his consent, and it was there clearly laid down that this section (s. 47) of the Act does not interfere with the jurisdiction of the Court to decree specific performance for disentailing entered into by him, but only prevents the Court from treating the contract as being in equity a disposition taking effect under the Act, so as to bind the issue in tail and remaindermen. And on the same principle it may be laid down that though the Court would not make an imperfect consent by a protector effectual, it would none the less, acting *in personam* against the protector, enforce specific performance of a covenant by him to consent. But whether the Court would have power to enforce specific performance of a mere contract not under seal by a protector of a settlement, is a point on which no judicial opinion has been given (cp. *Bankes v. Small*, *loc. cit.*, at p. 724).

Copyholds not being within the Statute *de Donis* (13 Edw. I. c. 1) are entailable by special custom only (see COPYHOLD; ESTATES OF INHERITANCE, *Estates Tail*), but the provisions of the Fines and Recoveries Act as regards freeholds are with certain variations made applicable to freeholds. Accordingly, as regards the consent of the protector in these cases, it is provided that, if given by deed, such deed shall either before or at the time of the surrender of the lands in question, be executed by the protector, and produced to the lord of the manor in order to be valid. A memorandum to the effect that it was produced within the prescribed time, must be endorsed on the deed by the lord or steward, and this is then entered on the rolls. If the consent is not given by deed, it must be given to the person taking the surrender, and in this case evidence of the consent is preserved on the Court rolls by stating in the memorandum of the surrender that the consent was given, and such memorandum being signed by the protector before it is entered on the Court rolls. Enrolment is not necessary in the case of copyholds.

**Protest and Noting.**—1. *Bill of Exchange.*—The protest of a bill of exchange (Bills of Exchange Act, s. 89), promissory note, or cheque (*ibid.* s. 73) is a notarial certificate (see NOTARY), attesting the presentment of the bill and its dishonour. The bill is presented by the notary's clerk, and after dishonour, at the earliest convenient opportunity, it is noted by the notary himself. *Noting* is effected by marking on the bill the notary's initials, date, noting charges, and a reference to the book in which the notary enters up a record of the matter (Chalmers on the *Bills of Exchange Act*, note to s. 51; Brooke's *Office of a Notary*, 3rd ed., p. 73). The protest is a formal instrument under the notary's seal. It must contain a copy of the bill, and specify the person at whose request the bill is protested, the place and date of protest, the demand made, and the answer given, if any, or the fact that the drawee or acceptor could not be found. It must be signed by the notary (Bills of Exchange Act, s. 51 (7)).



For an effective protest the bill must be noted on the day of its dishonour (s. 51 (4)), except that when the bill is presented, and returned dishonoured through the post, and received after business hours, it may be protested next day (*ibid.* (6)), and except also that delay is excused when caused by circumstances beyond the control of the holder of the bill, and not imputable to his fault or negligence (*ibid.* (9)).

The formal protest may be at any time subsequently written out or "extended" as of the date of the noting (ss. 51 (4) and 93). Every protest made out from his book by the notary is original evidence (*Geralopulo v. Wieler*, 1851, 10 C. B. 690).

The protest must be made at the place where the bill is dishonoured, unless (a) the bill is presented by post, and returned through the post dishonoured, when it may be protested at the place to which it is returned; or (b) it is drawn payable at the place of business or residence of some person other than the drawee, and has been dishonoured there for non-acceptance, when it must be protested for non-payment at the place where it is expressed to be payable, no further presentment for payment being necessary (s. 51 (6)).

Where a bill is lost or destroyed, or wrongly detained from the person entitled to hold it, protest may be made on a copy or written particulars of it (s. 51 (8)).

A *foreign bill*, appearing on the face of it to be such, must be protested for dishonour by non-acceptance, and for dishonour by non-payment, unless previously dishonoured by non-acceptance. If it is not protested the drawer and indorsers are discharged. An *inland bill* may be, and frequently is, noted for dishonour by non-acceptance or non-payment, as evidence of due presentment, but noting or protest is not necessary to preserve recourse against the drawer or indorsers (s. 51). Where the acceptor of a bill becomes bankrupt or insolvent, or suspends payment before the bill matures, the holder may cause the bill to be protested for better security against the drawer and indorsers (s. 51 (5)). The effect of this is that it may be accepted for honour (see HONOUR, vol. vi. p. 219).

The expenses of noting, or, when protest is necessary, and the protest has been extended, the expenses of protest, are part of the liquidated damages consequent on dishonour of a bill (s. 57). The expenses of a protest for better security are not recoverable as such damages (*In re English Bank of River Plate*, [1893] 2 Ch. 438).

Where the services of a notary cannot be obtained at the place where a bill is dishonoured, any householder or substantial resident of the place may, in the presence of two witnesses, give a certificate signed by them, attesting the dishonour, and the certificate in all respects operates as if it were a formal protest (s. 94). The Act gives the following form for such a protest:—

Know all men that I., A. B. [householder] of \_\_\_\_\_ in the county of \_\_\_\_\_  
in the U. K., at the request of C. D., there being no notary public available, did on the  
day of \_\_\_\_\_, 18\_\_\_\_, at \_\_\_\_\_, demand payment [or acceptance] of the  
bill of exchange here underwritten from E. F., to which demand he made answer [state  
answer, if any], wherefore I now, in the presence of G. H. and I. K., do protest the said  
bill of exchange.

(Signed) A. B.

G. H., I. K., Witnesses.

*N.B.*—The bill itself should be annexed, or a copy of the bill and all that is written thereon should be underwritten.

See BILLS OF EXCHANGE, vol. ii. p. 94.



2. *Ship*.—A statement of any accidents entailing delay or damage to a ship is sometimes drawn up in the form of a notarial protest, so as to make a record of the matter as early as possible. The following passage is, in substance, quoted from Abbott on *Shipping* (13th ed., p. 457). On the arrival of a vessel at her homeward port, and when compelled by accidents or injury to put back, or to put into a port other than her destination, it is usual for the master to cause a protest to be *noted*, and afterwards drawn up or extended. This is a declaration of the accidents enumerated. Protests are also made by the master against charterers or consignees for not loading (or unloading) without delay, or by the merchant against the master for misconduct, or for delay, or for refusing to sign bills of lading in the customary form.

The protest is made from statements before the notary by the master and, in general, by some of the crew (Brooke's *Office of a Notary*, 3rd ed., p. 146).

See, further, NOTARY.

**Protestant.**—This term originated at the second diet of Spire (1529), when the Lutheran minority *protested* against a decree modifying the decree of the first diet at that place (1526), providing for the manner in which the Emperor's edict condemning Lutheranism, issued at Worms in 1521, was to be carried out; the second diet practically forbidding the controversial statement of the Reformed doctrines. There is some evidence that until the decrees of the Council of Trent (1563) the Protestants were regarded in Germany as a section of the Church, and not as a separate dissentient body. On the Continent the term seems still to be strictly applied only to the Lutherans, other anti-Roman bodies being termed "Reformed." Regarding the use of it in England, and the question whether and in what sense the Church of England can properly be called a Protestant Church and her members Protestants, the facts are as follows: The word "Protestant" does not occur in the Book of Common Prayer, the Thirty-Nine Articles, or in any canon of the English Church; and its application to the Church of England or her members in any sense whatever cannot be supported by any document which has her authority or approval; indeed, the Lower House of the Convocation of Canterbury actually prevented the description of the Church as "Protestant" in an address to the Crown in 1689 (see Joyce, *Acts of the Church*, pp. 248, 249). The term, however, in the sense of "anti-papal," has been applied in various statutes, both to the Church of England and to the Episcopal Churches of Ireland, Scotland, and America, with which she is in full communion.

Thus the Church of Ireland describes herself as "Protestant" in the preamble to the constitution passed in 1870, though the special sense in which the word is used is shown by the fact that in an earlier part of the same document she speaks of herself as "the Ancient Catholic and Apostolic Church of Ireland." By the Act of Settlement (12 & 13 Will. III. c. 2 (1700)), the Crown was limited, after default of issue of that king and of Queen Anne, to the Electress of Hanover and her descendants, being "Protestants," and the same Act provides that every future sovereign shall join in communion with the Church of England as by law established; the sovereign at his or her coronation takes an oath to maintain the Protestant Reformed religion established by law (see also CORONATION OATH). But here again the signification of the term is made clear by the fact that later in the service the Ring is given as an "Ensign of the Defence



of the Catholic Faith." The word "Protestant" with the same meaning is also applied to the Church of England by the Act of Union with Ireland, to the Episcopal Church of Scotland by the Act 3 & 4 Vict. c. 33 (1840), and to the American Church by 5 Vict. c. 6 (1841).

The above view as to the sense which the term "Protestant" bears in its application to the Church of England is corroborated by the facts (1) that in the statutes in which it is so applied the antithesis to it is "Papist" or "Roman Catholic," and not "Catholic"; and (2) that the Church of England holds no communion with any continental Protestant body, nor with any non-episcopal body in any part of the world (see articles CHURCH OF ENGLAND; HOLY ORDERS).

In *In re Hunter*, [1897] 2 Ch. 105, the Court of Appeal held that the words "true Protestant and Church of England principles" occurring in the trusts of a will must be read as meaning the views and principles of what is known as the evangelical party in the English Church.

**Prothonotaries** were officers in the Courts of Common Pleas and Exchequer, who were superseded by the Masters (7 Will. IV. and 1 Vict. c. 30). In the ecclesiastical law, the name of prothonotary is given to an officer of the Court of Rome. He is so called because he is the *first notary*—the Greek word *πρωτος* signifying *primus* or first. These notaries, of which there are twelve, have pre-eminence over the other notaries, and are placed in the rank of prelates.

**Protocol**—The minute of a meeting of representatives of States assembled to confer or deliberate upon any given subject, in use since the Congress of Vienna (Calvo, *Dict. de Droit International*). It is also used for the rules of ceremonial followed in all writings which pass in the official relations between States and their representatives.

**Provide.**—Where the word "provide" occurs in a statute or legal instrument, it will receive the most natural interpretation consistent with the circumstances. So in 55 Geo. III. (1815) c. 137, s. 6, the meaning is clear from the context, which is to the effect that anyone in whose hands is the providing for, ordering, management, control, or direction of the poor shall be guilty of an offence against the Act if he provide, furnish, or supply goods to workhouses for his own profit (cp. the extending Act, 4 & 5 Will. IV. (1834) c. 76, s. 77; *Davies v. Harvey*, 1874, L. R. 9 Q. B. 433). As to the force of the word in deeds, where it was agreed by marriage articles that certain lands should be held until certain younger children should be "suitably provided" for, it was held that these words were not too vague or uncertain to be given effect to by the Court, but that the provision might be carried out by charging money portions upon the land (*Brenan v. Brennan*, 1868, L. R. 2 Eq. 266). Where, too, in a will a bequest was made to provide a proper school, the construction was arrived at by considering all the terms, and such bequest was held not to imply that land must be purchased, there being evidence that that would be in accordance with the intention of the testator, he having directed his trustees only to apply the dividends and not the principal, and it being possible to fulfil the charity without actual purchase of land (*Johnston v. Swann*, 1818, 3 Madd. 457; 18 R. R. 270).



**Provided.**—A clause beginning with this word is usually termed a proviso. It may have various effects. Sometimes it is to be taken for a condition, sometimes for an explanation, sometimes for a covenant, sometimes for an exception, and sometimes for a reservation.

It is taken for a condition as if a man lease land, provided that the lessee shall not alien without the assent of the lessor *sub pœna foris facturæ*; here it is a condition. If I have two manors, both of them called Dale, and I lease to you my manor of Dale, provided that you shall have my manor of Dale in the occupation of J. S.; here the proviso is an explanation what manor you shall have. If a man lease a house, and the lessee covenant that he will maintain it, provided always that the lessor is contented to find great timber; here it is a covenant. If I lease to you my messuage in Dale, provided that I will have a chamber myself; here it is an exception of the chamber. And if I make a lease rendering rent at such feasts as J. S. shall name, provided that the feast of St. Michael shall be one; here this proviso is taken for a reservation.

(Bac. *Abr. Covenant*; cp. Coke, *Litt.* 146 *b*, 203 *b*.) In testamentary gifts the word “provided” is often used as synonymous with “if,” “when,” “in case,” “so soon as,” etc., giving a contingent interest dependent upon the fulfilment of some event. In such cases, then, the clause introduced by the word will usually create a qualification or limitation on what goes before. “If” and “provided” seem to be more strongly contingent than “when.” Immediate vested rights may also be given in this way, the possession only being deferred.

In what sense the word is used in any particular instance will be a question of fact to be settled by a consideration of all the circumstances. Generally speaking, such words as “provided always” refer to and qualify what has preceded, and do not introduce a new and independent disposition (*Martelli v. Holloway*, 1872, L. R. 5 H. L. 532; *Suffield v. Baskerville*, 1675, 2 Mod. 36; *Geery v. Reason*, 1628, Cro. (3) 128). But sometimes, and especially where words showing an agreement to do something, are added, such as “and it is hereby agreed,” “and these presents are upon this express condition,” “and I hereby declare,” the clause introduced by the word “provided” will be construed as a covenant, even though the word “covenant” or “agree” does not occur in it (*Brookes v. Drysdale*, 1877, 3 C. P. D. 52; *Dicker v. Angerstein*, 1876, 3 Ch. D. 600). The phrase “provided always, and it is covenanted and agreed” was held to make a condition by the proviso and a covenant by the subsequent words (Coke, *Litt.* 203 *b*). In any case the construction must be such as will support the testator’s or settlor’s intention, and the most natural course will be to take the limitation and graft the proviso on to it (*Christie v. Gosling*, 1866, L. R. 1 H. L. 279; *Earl of Pembroke v. Berkley*, 1593, Cro. (1) 384).

**Provident Society.**—See INDUSTRIAL AND PROVIDENT SOCIETIES, vol. vi. p. 389.

**Province.**—See ARCHBISHOP; PROVINCIAL COURTS.

**Provincial Courts.**—These are the Courts of the Primates of Canterbury and York. In the province of Canterbury they consist of the Court of Arches, or the Supreme Ecclesiastical Court of Appeal for the province, which may take original cognisance of causes by letters of request from the Diocesan Courts; the Court of the VICAR-GENERAL, wherein bishops of the province are confirmed; the Court of the MASTER OF THE FACULTIES,



wherein cases relating to notaries public are heard; the Court of Audience (now obsolete); the Court of Peculiars (now obsolete; see PECULIAR); and the Court of the Commissary of the Archbishop, which has jurisdiction over the diocese of Canterbury, and from which an appeal lies to the Court of Arches (*Fagg v. Lee*, 1874, L. R. 4 Ad. & Ec. 135). In the province of York they consist of the Chancery Court or Supreme Court of Appeal for the province, the Consistory Court for the diocese, and the Court of Audience (now obsolete).

For a long time back several of these offices in the province of Canterbury have been joined in one person, and the same was the case in the province of York; and this state of things is now continued and extended by the PUBLIC WORSHIP REGULATION ACT, 1874. By this Act the two archbishops jointly appoint a judge of the Provincial Courts of Canterbury and York, who is to hold at the same time the offices of official principal of the Arches Court of Canterbury, and official principal or auditor of the Chancery Court of York, and Master of the Faculties to the Archbishop of Canterbury. All proceedings taken before him in relation to matters arising in the provinces of Canterbury and York are deemed to be taken in the Arches Court of Canterbury and the Chancery Court of York respectively; and he may be called upon by the archbishop of the province within which the cause arises to hear it at any place within the diocese or province or in London or Westminster. The judge is said (but see ARCHES, COURT OF) not to be the judge of a new Court constituted by the Act, but to be the judge of the old Courts of Canterbury and York; and his orders can be enforced as other ecclesiastical orders are by *significavit* and imprisonment or enrolment and sequestration (*Dale's case*, *Enraght's case*, 1881, 6 Q. B. D. 376, a Canterbury case; *Green v. Lord Penzance*, 1881, 6 App. Cas. 657, a York case). The Court is a superior Court and Court of Record, and the rules and orders regulating the procedure made by it have statutory authority, and are valid whether they otherwise sufficiently show jurisdiction or not (Manisty, J., *Dale's case*, above, 417).

[*Authority*.—Phillimore, *Eccl. Law*.]

**Provisional Order.**—During the present reign our domestic legislation has enormously increased, and Parliament could not grapple with it without assistance. The Private Bill Committees could not possibly deal with all the applications made to them by Municipal Corporations, Harbour Boards, Railway Companies, Improvement Commissioners, and every other kind of local authority; and yet such matters could only be disposed of by Act of Parliament. It was necessary, therefore, for the Legislature to delegate its authority to some of the great Government departments, at the same time keeping the final decision on each matter in its own hands. And so, the Provisional Order was invented. Power is given to some department or other body in which Parliament has confidence (generally on the application of some local authority) to hold, if necessary, a local investigation into the circumstances, and then, if it thinks proper, to prepare a detailed scheme, which is embodied in an Order. This order subsequently appears, with perhaps three, five, or ten similar orders, in the schedule to a "Provisional Order Confirmation Bill," introduced by the Government Department which has charge of such matters. It is, of course, still open to any body or person concerned or aggrieved (subject to the parliamentary rules as to *locus standi*) to oppose the bill in the ordinary way. But this seldom occurs; provisional orders are often confirmed by



Parliament almost as a matter of course. Thus in the year 1896 the Local Government Board issued fifteen provisional orders, which were grouped according to their subject-matter, and presented to Parliament in four confirming bills; and of the fifteen orders twelve were confirmed without opposition: one was confirmed with alterations; two were not confirmed (Twenty-Sixth Annual Report of the Local Government Board, p. xxxi.). A provisional order has no validity till it is confirmed; but when confirmed it has all the force of an Act of Parliament: it is indeed part of an Act of Parliament; it can thus alter, amend, or repeal former local Acts (Public Health Act, 1875, s. 303; L. G. Act, 1888, s. 59, subs. 6). Hence a local authority should not, as a rule, promote a bill in Parliament for any object which is attainable by provisional order (see 35 & 36 Vict. c. 91, s. 10).

Very various are the matters which can be dealt with by provisional order; very various, too, are the authorities to which the power of making such orders is confided. The Board of Trade has very extensive powers of granting provisional orders, principally under the following statutes:—

|                                  |                                                                |
|----------------------------------|----------------------------------------------------------------|
| 24 & 25 Vict. c. 45, ss. 3, 4.   | General Pier and Harbour Act, 1861.                            |
| 25 & 26 Vict. c. 19.             | General Pier and Harbour Act, 1861, Amendment Act, 1862.       |
| 25 & 26 Vict. c. 63, ss. 39, 40. | Merchant Shipping Act Amendment Act, 1862.                     |
| 31 & 32 Vict. c. 45, ss. 29–50.  | Sea Fisheries Act, 1868.                                       |
| 33 & 34 Vict. c. 70, s. 4.       | Gas and Water Works Facilities Act, 1870.                      |
| 33 & 34 Vict. c. 78, s. 4.       | Tramways Act, 1870.                                            |
| 36 & 37 Vict. c. 71, s. 49.      | Salmon Fishery Act, 1873.                                      |
| 36 & 37 Vict. c. 89.             | Gas and Water Works Facilities Act, 1870, Amendment Act, 1873. |
| 44 Vict. c. 11, s. 2.            | Sea Fisheries (Clam and Bait Beds) Act, 1881.                  |
| 45 & 46 Vict. c. 56, s. 4.       | Electric Lighting Act, 1882.                                   |
| 47 & 48 Vict. c. 27.             | Sea Fisheries Act, 1884.                                       |
| 51 & 52 Vict. c. 12, ss. 1–3.    | Electric Lighting Act, 1888.                                   |
| 51 & 52 Vict. c. 25, s. 24.      | Railway and Canal Traffic Act, 1888.                           |
| 52 & 53 Vict. c. 68, s. 2.       | Merchant Shipping (Pilotage) Act, 1889.                        |

The Board of Trade has also power in many cases to grant provisional certificates, especially in connection with railway companies.

The Local Government Board is authorised to grant provisional orders under the following statutes:—

|                                                                                           |                                                    |
|-------------------------------------------------------------------------------------------|----------------------------------------------------|
| 30 & 31 Vict. c. 106, ss. 2, 3.                                                           | Poor Law Amendment Act, 1867.                      |
| 31 & 32 Vict. c. 122, s. 3.                                                               | Poor Law Amendment Act, 1868.                      |
| 38 & 39 Vict. c. 55, ss. 161, 176, 208, 211, 270, 271, 279, 280, 287, 297, 303, 304, 323. | Public Health Act, 1875.                           |
| 39 & 40 Vict. c. 61, ss. 1, 2.                                                            | Divided Parishes and Poor Law Amendment Act, 1876. |
| 42 & 43 Vict. c. 54, ss. 4, 5, 9.                                                         | Poor Law Act, 1879.                                |
| 44 & 45 Vict. c. 37, s. 10.                                                               | Alkali, etc., Works Regulation Act, 1881.          |
| 45 & 46 Vict. c. 58, s. 2.                                                                | Divided Parishes and Poor Law Amendment Act, 1882. |
| 51 & 52 Vict. c. 41, ss. 4, 10, 14, 52–55, 59.                                            | Local Government Act, 1888.                        |
| 56 & 57 Vict. c. 73, s. 36.                                                               | Local Government Act, 1894.                        |

A County Council has power under sec. 57 of the L. G. Act of 1888, and under sec. 54, subsec. 2 (a) of the L. G. Act of 1894, to make orders for the alteration of areas, which are in the nature of provisional orders, and must be submitted, as a rule, to the Local Government Board for confirmation. A County Council may itself make provisional orders as to allotments under 50 & 51 Vict. c. 48, s. 3, and 53 & 54 Vict. c. 65, s. 4.



The Board of Agriculture has power to make provisional orders under the following Acts:—

|                                       |                                            |
|---------------------------------------|--------------------------------------------|
| 8 & 9 Vict. c. 118, s. 27.            | General Inclosure Act, 1845.               |
| 9 & 10 Vict. c. 70, s. 1.             | General Inclosure Act Amendment Act, 1846. |
| 22 & 23 Vict. c. 43, s. 1.            | Inclosure Act, 1859.                       |
| 24 & 25 Vict. c. 133, ss. 26, 64, 65. | Land Drainage Act, 1861.                   |
| 29 & 30 Vict. c. 122, ss. 5, 13, 22.  | Metropolitan Commons Act, 1866.            |
| 34 & 35 Vict. c. clviii. ss. 54, 55.  | Thames Valley Drainage Act, 1871.          |
| 39 & 40 Vict. c. 56, ss. 2-12.        | Commons Inclosure Act, 1876.               |

The Home Secretary is empowered to make provisional orders by the following Acts of Parliament:—

|                             |                                           |
|-----------------------------|-------------------------------------------|
| 38 Vict. c. 17, s. 103.     | Explosives Act, 1875.                     |
| 49 Vict. c. 22, s. 4.       | Metropolitan Police Act, 1886.            |
| 53 & 54 Vict. c. 45, s. 22. | Police Act, 1890.                         |
| 53 & 54 Vict. c. 70, s. 8.  | Housing of the Working Classes Act, 1890. |

The Education Department (33 & 34 Vict. c. 75, s. 20), the Postmaster-General (55 & 56 Vict. c. 59, s. 2), the Secretary of State for War (55 & 56 Vict. c. 43, s. 2), the Secretary of State for Scotland (48 & 49 Vict. c. 61), the Lord-Lieutenant of Ireland in Council (46 & 47 Vict. c. 43, s. 11), and many other similar persons and bodies have also power to grant provisional orders.

The Courts of law have no jurisdiction to interfere in any matter relating to the application for or the grant of any provisional order, except where the application is against good faith and equity, when apparently it may be restrained (*Telford v. Metropolitan Board of Works*, 1872, L. R. 13 Eq. 574). If the confirming bill be opposed, it is generally referred to a select committee, which will hear all objections (Standing Orders, 151, 208 A). As to the procedure in Parliament, see May's *Parliamentary Practice*, 10th ed., pp. 705, 709, 728, 780.

As soon as the provisional order has been confirmed, it operates, and will be construed, as an Act of Parliament (*L. & N.-W. Rwy. Co. v. Donellan*, [1898] 1 Q. B. 748).

**Proviso.**—The term “proviso” and condition are synonymous, and signify some quality annexed to a real estate, by virtue of which it may be enlarged, defeated, or created upon an uncertain event (Bacon's *Abr. sub tit.* “Condition”).

The word “proviso” is used frequently to denote the clause, the first words of which are “Provided that,” inserted in deeds and instruments generally, and containing a condition or stipulation on the performance or non-performance of which, as the case may be, the effect of a preceding clause or of the deed depends. We may take as notable instances the proviso for re-entry, in leases, on breach of covenants by the lessee; the proviso for redemption in mortgages providing that on payment off the mortgagee shall reconvey to the mortgagor. Provisoes are also frequently inserted in statutes, *e.g.* for saving existing rights, or rights of the Crown, or generally for exemptions from the operation of the particular Act.

“It always implies a condition, unless subsequent words change it to a covenant, but when the proviso contains the mutual words of the parties to a deed, it amounts to a covenant” (2 Co. 72). If, therefore, the words are “provided, and it is hereby covenanted and agreed between the parties that, etc.,” they create both a condition and a covenant.

Though the words “provided that” are the most apt words to make an



estate conditional, the words may have another operation as well, and may serve to qualify, limit, or by way of covenant only, *e.g.* where one party covenants to do one thing, *provided* the other does something else. And for the estate to be conditional, the following requisites must be complied with:—(1) The proviso must not be dependent upon any other sentence in the deed; (2) the condition must be compulsory on the grantee; (3) it must be imposed by the grantor; (4) it must have application to the estate, and not to some other matter (see *Shep. Touchstone*, 122; *Co. Litt.* 203 b).

**Provocation.**—It is a defence to a charge of murder that the fatal act was committed in the heat of passion caused by sudden provocation, and before there was time for the passion to cool. But the defence does not amount to excuse or justification, and operates only to reduce the offence from murder to manslaughter, and fails wholly if the accused acted after he had time to reflect and cool (see *CHANCE MEDLEY*; *DUEL*; *MANSLAUGHTER*).

On charges of assault the plea of provocation is no defence at all, but may be a very strong plea in mitigation of punishment; and in civil proceedings for trespass to the person the plea of provocation also operates in mitigation of damages.

[*Authority.*—Archbold, *Cr. Pl.*, 21st ed., 725.]

**Provost**—The principal magistrate of a royal borough in Scotland. The title was also frequently applied to the heads of collegiate foundations in England, and is still borne by the heads of King's College, Cambridge; Queen's, Oriel, and Worcester Colleges, Oxford; and by the head of Eton College; and the heads of some modern collegiate schools are so named.

**Provost-Marshal.**—The powers of this officer are now limited by sec. 74 of the Army Act, 1881 (44 & 45 Vict. c. 58). The appointment of a provost-marshal could and can only be made when troops are on service abroad. His powers, before the Army Act of 1879, were the prompt and instant suppression of all irregularities and crimes abroad, committed by troops in the field and on the line of march, according to the usages of war and rules of the service. He could punish offenders detected in the actual commission of crime, and actually seen by him or his assistants. He had the charge of the order and discipline of the camps, and he executed the sentences of courts-martial.

The above-mentioned section provides that provost-marshals may be appointed by the general order of the general officer commanding a body of forces. A provost-marshal or his assistants may at any time arrest and detain for trial persons subject to military law committing offences, and may also carry into execution any punishments to be inflicted in pursuance of a court-martial, but they are not to inflict any punishment of their own authority.

The provost-marshal is always a commissioned officer, but the assistants may be either officers or non-commissioned officers.

Garrison and regimental provost-sergeants are appointed for the maintenance of order when soldiers are in the United Kingdom, and the garrison or regimental police are placed under their superintendence (*Army Regulations*, s. vi.). See *COURTS-MARTIAL*; *MILITARY LAW*.



**Proxenetæ.**—One case in which equity did not follow the civil law was in declining to countenance the stipulations of *proxenetæ* or match-makers for rewards or remuneration for negotiating advantageous marriages. In equity all such contracts or agreements respecting marriage, usually called marriage brokage contracts, are absolutely void, both as being injurious to or subversive of the public interest, and as tending to a deceit on one party to the marriage or to the parents or friends (*Heap v. Marriis*, 1876, 2 Q. B. D. 630; *Law v. Law*, 1735, Ca. t. Talb. 140; *Roberts v. Roberts*, 1730, 3 P. Wms. 66). So where a bond had been given by a suitor for the hand of a lady to pay £500 ten days after marriage to a *proxenetæ*, and a verdict had been obtained thereon, but the executors filed a bill in Chancery for relief, the result of an appeal to the House of Lords was an order to have the bond delivered up (*Hall v. Thynne*, 1729, Show. P. C. 76). Marriage brokage contracts have since then also been void at law (*Collins v. Blantern*, 1767, 2 Wils. 347), and money paid in pursuance thereof has been allowed to be recovered (*Smith v. Bruning*, 1700, 2 Vern. 392). Even the fact that the marriage was without disparagement and otherwise proper, or that the parties had confirmed the agreement, would not validate a brokage contract (*Cole v. Gibson*, 1750, 1 Ves. 506).

**Proxies.** — See BANKRUPTCY, vol. i. p. 499; COMPANY, vol. iii. p. 203.

**Proximate Cause.**—See DAMAGES; NEGLIGENCE.

**Public Accounts** are the accounts of the expenditure of the nation. They are rendered to the Comptroller and Auditor-General under 29 & 30 Vict. c. 39. See also 38 & 39 Vict. c. 45; 39 & 40 Vict. c. 14, s. 1; 52 & 53 Vict. c. 53, s. 20. The Statute Law Revision Act, 1893, repeals the following parts of the 29 & 30 Vict. c. 39:—Preamble, and to “same as follows”; sec. 2, from “the Treasury” to “National Debt,” where these words occur last; sec. 3, to “auditor,” where that word thirdly occurs, and the words “said” before “Comptroller” and “her heirs and successors”; sec. 5, to “abolished but,” and from “and it shall” to the end of the section; sec. 6, the words “her heirs and successors”; sec. 39, to “notwithstanding; but”; sec. 46, to “schedule, and,” and from “or to affect” to the end of the section; sec. 47, Sched. C. See Todd’s *Parl. Gov.* vol. ii. pp. 261–266.

**Public Acts.**—See PUBLIC STATUTES.

**Public Agent.**—The rules of law governing the rights, duties, and liabilities of public agents (*i.e.* agents of the Crown or Government), and the responsibility of the Crown for their acts and defaults, differ in many respects from those which apply in the case of private agencies.

No public agent is personally liable, nor is he entitled to sue in his own name (*Bowen v. Morris*, 1810, 2 Taun. 374), on any contract made by him in his public or official capacity, though the terms of the contract be such that he would have been personally liable if he had been acting on behalf of an ordinary principal (*Palmer v. Hutchinson*, 1881, 6 App. Cas. 619; *Prosser*



v. *Allen*, 1819, Gow, 117). In *Macbeath v. Haldimund*, 1786, 1 T. R. 172; 1 R. R. 177, it was held that a colonial governor was not liable for the price of goods ordered by him and debited to the Government; in *O'Grady v. Cardwell*, 1873, 21 W. R. 340, that the Secretary of State for War was not liable to be sued on a contract entered into by him on behalf of the War Department; and in *Rice v. Chute*, 1801, 1 East, 579, that the captain of a troop was not liable for the price of forage supplied to the troop on the orders of a clerk appointed by him. In *Unwin v. Wolseley*, 1787, 1 T. R. 674 (not following *Cunningham v. Collier*, 1785, 4 Doug. K. B. 233), the same principle was applied in the case of a contract under seal, expressed to be made on behalf of the Government. In such cases, credit is always taken to be given to the Government, in the absence of clear proof of an intention by the agent to be personally liable. Nor does the doctrine of an implied warranty of authority (see PRINCIPAL AND AGENT) apply to public agents contracting on behalf of the Crown (*Dunn v. MacDonald*, [1897] 1 Q. B. 555). If, however, a public agent expressly pledges his personal credit, or the circumstances are such as to clearly indicate that it is his intention to contract personally, he will be personally liable (*Prosser v. Allen*, 1819, Gow, 117; *Auty v. Hutchinson*, 1848, 6 C. B. 266). In *Clutterbuck v. Coffin*, 1842, 3 Man. & G. 842, a naval commander, who undertook to pay a cook employed by him a certain sum per annum in addition to the Government pay, was held personally liable to pay such additional sum, on the ground that the contract was made by him in his personal capacity, and not as an agent for the Crown. The Crown is entitled to sue, and may be sued by petition of right, in respect of any contract duly made on its behalf by a public agent (*Thomas v. R.*, 1874, L. R. 10 Q. B. 31).

A public agent who receives money in his official capacity, for payment to any third person, is not liable or accountable to such third person, either at law or in equity, in respect of such money (*Grenville-Murray v. Clarendon*, 1869, L. R. 9 Eq. 11; *Kinloch v. Sec. of State for India*, 1882, 7 App. Cas. 619). In *Gidley v. Palmerston*, the Secretary for War was sued by a retired clerk of the War Office for his retiring allowance, and it was held that the action would not lie, even if the defendant was shown to have received the money applicable to such allowance. Nor will a mandamus lie to the Lords of the Treasury or Secretaries of State to compel them to apply public money in their hands according to the provisions of the Appropriation Act or a Royal Warrant. A public agent is answerable to the Crown, and to the Crown alone, in respect of public moneys in his hands (*R. v. Sec. of State for War*, [1891] 2 Q. B. 326; *R. v. Treasury*, 1872, L. R. 7 Q. B. 387). The same principle applies to agents of foreign States (*Twycross v. Dreyfus*, 1877, 5 Ch. D. 605). For *Palmerston* case, see 3 B. & B. 285.

There is no remedy against the Crown, by petition of right or otherwise, for the wrongful acts or omissions of a public agent (*Tobin v. R.*, 1864, 16 C. B. N. S. 310; *Feather v. R.*, 1865, 6 B. & S. 257). But every public agent is personally liable for his own wrongful acts and omissions (*Rowning v. Goodchild*, 1772, 3 Wils. 443; *Barnes v. Foley*, 1771, 5 Burr. 2711), and the fact that the act or omission was authorised or ratified by the Crown constitutes no defence in an action by a British subject (see ACT OF STATE). No action lies, however, at the suit of a member of any foreign State, in respect of anything done by the authority of, or subsequently ratified by, the Crown (*Buron v. Denman*, 1848, 2 Ex. Rep. 167). A public agent is not liable for the wrongs of his subordinates, unless he authorised or was otherwise party or privy thereto (*Nicholson v. Mounsey*, 1812, 15 East, 384; *Lane v. Cotton*, 12 Mod. Ca. 473; *Whitfield v. Le Despencer*, 1778, Cowp.



754; *Stock v. Harris*, 1771, 5 Burr. 2709; *Duncan v. Findlater*, 1839, 6 Cl. & Fin. 894, 903; and see *Raleigh v. Goschen*, [1898] 1 Ch. 73).

[*Authorities*.—See Bowstead on *Agency*, 2nd ed.; Story on *Agency*; Evans on *Principal and Agent*.]

**Publicans.**—See INNKEEPER; INTOXICATING LIQUOR; LICENSING.

**Public Appointments.**—1. The sale of appointments to any public office under the Crown or national Government is prohibited by statute.

The Sale of Offices Act, 1551 (5 & 6 Edw. VI. c. 16), deals with the following offices:—(1) Those touching or concerning the administration or execution of justice and clerkships in any Court of record, or the receipt, control, or payment of any of the Crown's treasure, rent, revenue, or account; (2) those touching the audit or survey of Crown honours, castles, manors, lands, tenements, woods, or hereditaments; (3) offices connected with the customs. It does not apply to offices of inheritance, or to partnerships, or keeperships of royal houses, manors, chases, and forests (s. 3; *Huggins v. Bambridge*, Willes, 245). It prohibits the sale or purchase of any such office, and the direct or indirect receipt of any money or profit, or the taking of any agreement or assurance to receive money or profit for obtaining any such office. Disobedience to the statute entailed forfeiture of the office by the seller, and disability to hold it on the buyer; and the agreements within the Act are absolutely void; but the acts of the offender in office prior to an action are not invalidated by his breach of the Act (s. 4; *Garforth v. Fearon*, 1790, 1 Black. H. 327; 2 R. R. 778).

Taking a fee for or buying or selling the office of clerk of the peace is prohibited under penalties by 1 Will. & Mary, c. 21, s. 7.

The Sale of Offices Act, 1809 (49 Geo. III. c. 126), extends the Act of 1551 to Scotland and Ireland, and to all offices in the gift of the Crown, or of any office under the Crown; and to all commissions, civil, naval, and military, and all employments under the superintendence and control of the Treasury, the Secretary of State, the Admiralty, the Commander-in-Chief, and the principal offices of any department of the Government at home, or in the colonies or India. This includes Postmasterships (*Bourke v. Blake*, 1857, 7 Ir. Com. L. 348). On forfeiture of any office the next appointment goes to the Crown (s. 2).

Purchase or sale of offices within the Acts is made a misdemeanour (s. 3), as is the receipt or payment of money for soliciting office, or for any negotiations or pretended negotiations relating thereto (s. 4), and the opening or advertising of houses for transacting business relating to the sale of such offices (s. 5). The offences, if committed outside the United Kingdom, are triable in England in accordance with the provisions of 42 Geo. III. c. 85 (49 Geo. III. c. 126, s. 14). Persons who advertise houses for the sale of offices, or the broker of agents or broker for offices, or proposals to obtain such offices for money, are liable to a penalty of £50, recoverable by a common informer by action in the High Court (s. 6; *Clarke v. Harvey*, 1815, 1 Pea. N. P. C. 92).

The Acts do not apply to the appointment or payment of deputies to execute an office where a deputy may be appointed by law (s. 10), nor to annual payments out of the fees of an office to a former holder, which are specified (with the reasons for making them) in the commission or appointment of the successor (s. 11).



The Acts do not affect exchanges from regiment to regiment in the army, authorised by the army regulations (38 & 39 Vict. c. 16).

Under the repealed secs. 7, 8 of the Act of 1809, sale of commissions in the army was allowed under conditions, until abolished by Royal Warrant in 1870.

2. The purchase or sale of an office under a public body concerned in local government appears to be within the provisions of the Public Bodies Corrupt Practices Act, 1889 (52 & 53 Vict. c. 69).

3. Refusal to accept a public office on election has, in certain cases, been held to be a misdemeanour, *e.g.* constables and overseers of the poor. See *Archb. Cr. Pl.*, 21st ed., 1074.

[*Authority*.—*Chit. Stat.* vol. viii. tit. "Offices."]

**Publication.**—By publication is meant the surrender of the thing published to the public use. That is a fact, like other questions of fact, to be established by a jury; two matters having to be made out: (1) The fact of publication; and (2) the consent of the author to that publication. To prove publication, some act inconsistent with exclusive ownership must be shown. So the retention of a literary work in MS. will be strong presumption of a disinclination to publish; whereas, on the other hand, printing such a work and giving it public circulation will almost certainly establish surrender. There can, however, be no fixed rule, the intention of the author being in every case a material circumstance (*Exchange Telegraph Co. v. Central News*, [1897] 2 Ch. 48; *White v. Geroch*, 1819, 2 Barn. & Ald. 298). So the sale of a MS. copy of a book may constitute publication thereof, or even the single performance of a play in a theatre, and yet a gratuitous circulation among friends or pupils may not (*Caird v. Sime*, 1887, 12 App. Cas. 326; *Prince Albert v. Strange*, 1849, 18 L. J. Ch. 120; *Queensberry v. Shebbeare*, 1758, 2 Eden, 329). The use of letters in open Court as evidence is not publication, nor is the private recitation or communication of a literary or musical composition; and an unauthorised or surreptitious publication without an author's consent cannot defeat his right of property. Even express permission to pupils to take copies of lectures, need not necessarily make out abandonment (*Palmer v. Dewitt*, 1871, 23 L. T. N. S. 823; *Turner v. Robinson*, 1860, 10 Ir. Ch. N. S. 510, 517). See, further, COPYRIGHT; DESIGNS; PATENTS.

The term publication is also used in the sense of divulgence or proclamation. So publication of a citation in the newspapers is frequently ordered by the Court in divorce and probate cases. And one of the forms of substituted service is by public advertisement (R. S. C. 1883, Order 67, r. 6). In Chancery suits formerly publication of evidence was largely practised, but now it is unnecessary, as all parties attend the examination of witnesses. But the publication of the state of affairs in a newspaper is still often directed in the Chancery Division as a necessary step in the proceedings. See, further, COMPANY; BANKRUPTCY; RAILWAY.

An award is published and "ready to be delivered" as soon as it is completed and executed by the arbitrator before witnesses, after which date it cannot be set aside on the ground that the plaintiff had died the following day (*Brooke v. Mitchell*, 1840, 6 Mee. & W. 473). See ARBITRATION.

As to the publication of proceedings in Parliament and the Courts of Justice, etc., and of apologies in newspapers, see vol. i. 38; APOLOGY; DEFAMATION.

Wills are supposed to be published when they are properly executed before witnesses (*Smith v. Adkins*, 1872, L. R. 14 Eq. 402; *Mason v. Hey-*



*wood*, 1838, 7 L. J. Ch. 145). Formerly a will had also to be declared by the testator as his written will, but in practice oral evidence thereof was not required, and it was sufficient if it was proved to be in the testator's handwriting (2 Black. Com. 501). Now the Wills Act, 1837, 7 Will. IV. and 1 Vict. c. 26, imposes requisites for the validity of wills, and expressly enacts that no publication other than is implied in the properly attested execution shall be necessary in future (s. 13). See WILL.

As to the publication of banns of marriage, see the Statutes 4 Geo. IV. (1823), c. 76; 6 Geo. IV. (1825), c. 92; and 11 Geo. IV. and 1 Will. IV. (1830), c. 18; and BANNES OF MARRIAGE.

## Publication (in Cases of Defamation).

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### I. IN CIVIL CASES OF DEFAMATION.

*Publication to a Third Person.*—In order to succeed in any action of libel or slander, the plaintiff must prove that the defendant published the defamatory words; that is, that he communicated them to some third person or persons. The *onus* lies on the plaintiff to prove an actual publication by the defendant prior to the date of the writ. No cause of action arises if the words are only communicated to the person libelled; for that does not injure his reputation, though it may wound his self-esteem. A man's reputation is the estimate in which others hold him, not the good opinion which he has of himself. The defendant may have done all in his power to publish the words, yet if they never reach the ear or eye of anyone except the plaintiff himself, no action lies. That some third person had the opportunity of hearing or reading the words is not sufficient, if the jury are satisfied that he did not avail himself of the opportunity.

The fact that the defendant desired and intended publication to a third person is not sufficient ground for an action. The plaintiff must prove a publication in fact, and not merely in intention. He cannot recover damages for a publication which might have happened, but did not, because no injury has been done to his reputation. Hence, merely composing a libel is not actionable; and merely writing a libel is not actionable, unless it be subsequently published.

A publication, then, to the plaintiff alone is in a civil action no publication at all. But it is not often that a libel is sent direct to the plaintiff without being first shown to someone. Thus, if the defendant writes a letter to the plaintiff and sends it to him by post direct, but before posting it he reads it to a friend, that is a publication to the friend. Or, if before posting it direct to the plaintiff, he gives it to a clerk to copy, this again is a publication by the defendant to his own clerk. Where the managing director of a company dictated a letter containing words defamatory of the plaintiff, to a shorthand clerk, who transcribed it by a type-writing machine; and the type-written letter



was then signed by the managing director, press-copied by the office boy, placed in an envelope, and sent direct to the plaintiff's office; this was held by the Court of Appeal to be a publication both to the typewriter and to the office boy (*Pullman v. Hill & Co.*, [1891] 1 Q. B. 524; *Boxsius v. Goblet Frères*, [1894] 1 Q. B. 842).

If the defendant writes a libellous letter, and addresses it to the person libelled at his place of business, and it is there opened by his clerk, properly and in the ordinary course of business, this is a publication by the defendant to the plaintiff's clerk (*Pullman v. Hill & Co.*, *supra*; *Gomersall v. Davies*, 1898, 14 T. L. R. 430). So if the defendant writes libellous words on a post-card, which he addresses to the plaintiff, and posts, and the words are read by the postman and by the plaintiff's servants; it may be that the defendant never intended them to read what he wrote; still this is undoubtedly a publication by him to them. He should not have used a post-card. In practice, whenever the defendant uses a post-card, the plaintiff is not expected to prove that there has in fact been a publication; it is for the defendant to prove that there has not (see *Smith v. Crocker*, 1889, 5 T. L. R. 441).

So if the defendant sends a message by telegram instead of in an envelope properly fastened up, this is clearly a publication by the defendant to at least two telegraph clerks (*Williamson v. Freer*, 1874, L. R. 9 C. P. 393).

But where the defendant wrote a letter and gave it to B. to deliver to the plaintiff, and the letter was folded but not sealed, so that B. could have read it if he had thought fit, still if B. does not read it, but conveys it direct to the plaintiff, there is no publication (*Clutterbuck v. Chaffers*, 1816, 1 Stark. 471). Again, where the defendant threw a sealed letter addressed to the plaintiff, "or C.," into M.'s enclosure, and M. picked it up and delivered it unopened to the plaintiff himself, who alone was libelled, there was no publication, for neither C. nor M. read the letter. So posting up a libellous placard and taking it down again before anyone can read it, is no publication. If, however, it was exhibited long enough for anyone to read it, then the defendant must satisfy the jury that no one actually did read it.

*Husband and Wife.*—There is an old rule of law that a husband and his wife are one, and this is still law for many purposes, in spite of the Married Women's Property Acts. Yet the plaintiff's wife is in law sufficiently a third person to make a communication to her of words defamatory of her husband a publication in law. She is often the last person to whom the plaintiff would wish such a communication to be made. Hence an action lies if the defendant publishes a libel or a slander on the plaintiff to the plaintiff's wife (*Wenman v. Ash*, 1853, 13 C. B. 836; *Jones v. Williams*, 1885, 1 T. L. R. 572). On the other hand, the law protects all communications between husband and wife, so long as no one else shares their confidences. No action lies for a libel written or words spoken by a husband and published by him only to his wife. Such a communication is not in law a publication at all (*Wennhak v. Morgan*, 1888, 20 Q. B. D. 635).

*Unintentional Publication.*—No action lies, as we have seen, if there be in fact no publication, although the defendant desired and intended to publish the words. Similarly, an action lies whenever the defendant's words are in some way published to a third person, although he never desired or intended to publish them; unless, indeed, he can show that such publication occurred through no act or fault of his. If by his conduct he has in fact injured the plaintiff's reputation, though inadvertently, he must pay damages. It is no defence that he never intended any third person to overhear the slander or



to read the libel, if in fact he has done so. The absence of such intention may diminish the amount of such damages, but it does not affect the plaintiff's cause of action. Although he published the words accidentally or unintentionally, he will still be liable in damages, unless he can satisfy the jury that he was guilty of no negligence, and was not at all to blame in the matter. But the defendant will not be liable for the unauthorised or wrongful act of an independent third person.

Thus, if a man has in his possession two documents of similar appearance, one libellous and one not, he will be liable in a civil action for damages if he hands the libellous document to a friend to read, mistaking it for the innocent one. So if a man writes a libellous letter, meaning to send it direct to the plaintiff, and by mistake places it in an envelope addressed to B., who receives and reads it, this is a publication (*Tompson v. Dashwood*, 1883, 11 Q. B. D. 43). If A. writes a libel and leaves it about on the desk in his room, so that it will catch the eye of any chance visitor; and a visitor is shown into the room in his absence, and sees the libel there and reads it; that would be a publication of the libel to that visitor. A. is to blame for leaving such a document about.

The proprietor of a newspaper is liable for whatever appears in its columns, although he never saw the words till after they were printed and published; and although he may have expressly instructed his editor not to publish anything libellous. He should have chosen a more careful editor (*R. v. Walter*, 1799, 3 Esp. 21; *R. v. Gutch and Others*, 1829, Moo. & M. 433).

The sale of each written or printed copy of a libel is *prima facie* an actionable publication. But if the defendant is a newsvendor, who neither wrote nor printed the libel, but merely sold the newspaper containing it in the ordinary way of his business, and who neither knew nor ought to have known that that newspaper did contain, or was likely to contain, any libellous matter, he will not be deemed to have published the libel which he thus innocently disseminated (*Emmens v. Pottle*, 1885, 16 Q. B. D. 354; *Mallon v. W. H. Smith & Son*, 1893, 9 T. L. R. 621).

If the defendant wrote a libellous letter, and placed it in an envelope properly addressed to the person libelled, and fastened it down, and sent it to him by a messenger, who wrongfully broke open the envelope and read the libel, that would be no publication by the defendant to the messenger. For the only publication there was solely caused by the wrongful act of the messenger, and the defendant was guilty of no negligence in the matter.

*Publication per alium.*—Everyone who requests or procures another to write, print, or publish a libel is answerable as though he wrote, printed, or published it himself. And such request need not be express; it may be inferred from the defendant's conduct. Thus a man who sends a manuscript to the editor of a newspaper, and makes no effort to restrain his publishing it, has caused it to be published in the paper (*Bond v. Douglas*, 1836, 7 Car. & P. 626; *Tarpley v. Blabey*, 1836, 2 Bing. N. C. 437). The proprietor of every newspaper is responsible for what his men print and publish; for he has given general orders to the compositors to set up in type whatever the editor sends to press. And the editor, the printer, and the publisher are all liable as well.

But the defendant is only liable for his own acts and those of his servants or agents. He will not be responsible for any publication which is caused solely by the independent act of a third person, who is not his servant or agent. As Lord Esher, M. R., says in *Pullman v. Hill & Co.*, [1891] 1 Q. B. at p. 527: "If the writer of a letter locks it up in his own desk, and a thief



comes and breaks open the desk and takes away the letter and makes its contents known, I should say that would not be a publication by the writer." But if the defendant had any share in the matter, or by any act or conduct contributed to cause the publication, he will be liable.

*Republication.*—Thus the defendant is not liable, as a rule, if other people repeat what he has said. Each repetition of a slander is a distinct and separate act, and every person who repeats it is an independent slanderer, and he alone is answerable for the consequences of his own unlawful act. If the words be not actionable *per se*, the man who invented the slander is not liable to any action, although its circulation may eventually cause special damage to the plaintiff. The man whose repetition of the words actually caused the damage is the only person who can be made defendant (*Ward v. Weeks*, 1830, 7 Bing. 211; *Clarke v. Morgan*, 1877, 38 L. T. 354).

To this rule there are two apparent exceptions: (a) Where by communicating a slander to A., the defendant puts A. under a moral obligation to repeat it to some other person immediately concerned; there, if the defendant knew the relation in which A. stood to this other person, he will be taken to have contemplated this result when he spoke to A. In this case, in fact, A.'s repetition is the natural and necessary consequence of the defendant's communication to A. (*Speight v. Gosnay*, 1891, 60 L. J. Q. B. 231; 55 J. P. 501). (b) Where there is evidence that the defendant, though he spoke only to A., intended and desired that A. should repeat his words, or expressly requested him to do so; here the defendant is liable for all the consequences of A.'s repetition of the slander; for A. thus becomes the agent of the defendant (*Whitney v. Moignard*, 1890, 24 Q. B. D. at p. 631).

*Prior Publication.*—So, too, the fact that someone else previously published a similar libel or slander on the plaintiff will afford no defence to the present defendant. The prior publication of the libel is no justification for its being copied and republished, even though the defendant never contradicted it or challenged it, and took no proceedings against the prior publisher (*R. v. Newman*, 1852, 1 El. & Bl. 558; 3 Car. & Kir. 252; *Tidman v. Ainslie*, 1854, 10 Ex. Rep. 63). So every repetition of a slander is necessarily a wilful publication of it, rendering the speaker liable to an action; and to such an action, it is no defence that the speaker did not himself originate the tale, but heard it from another. This is so, even where the story was a current rumour, which the defendant *bonâ fide* believed to be true (*Watkin v. Hall*, 1868, L. R. 3 Q. B. 396). By repeating it, the defendant has indorsed it, and given the falsehood greater weight and wider currency; and he is as liable to an action as the man who invented it and set it in circulation. It is no defence to such an action that the defendant, when he repeated the scandal, named the person from whom he had heard it (*M'Pherson v. Daniels*, 1829, 10 Barn. & Cress. 270; 5 Man. & R. 251); though he may give that fact in evidence in mitigation of damages. And see PRIVILEGE, *ante*, p. 439.

## II. IN CRIMINAL PROCEEDINGS.

*Distinction between Civil and Criminal Proceedings.*—The law as to publication in criminal cases differs in many respects from that stated above with regard to civil actions. The point of view is different. The object of civil proceedings is to clear the character of the plaintiff, and to compensate him for any injury done to his reputation; he must show, therefore, that his reputation has in fact been injured; otherwise he has no claim to compensation. And if his reputation has in fact been injured, he is entitled to com-



pensation, although the injury was done innocently or inadvertently. But very different considerations apply to an indictment or information for libel. The object of criminal proceedings is to protect the public; to repress all acts which are likely to lead to disaffection, or conduce to a breach of the peace; and to preserve harmony and good order in the State. Hence criminal proceedings may be taken in cases where no action would lie, and *vice versa*.

(i.) *Unintentional Publication*.—*Actus non facit reum, nisi mens sit rea*. No man is criminally liable for an unconscious or accidental publication. "The mere delivery of a libel to a third person by one *conscious of its contents* amounts to a publication, and is an indictable offence" (per Wood, B., in *Maloney v. Bartley*, 1812, 3 Camp. at p. 213). But if the defendant can satisfy the jury that, when he delivered the libel, he had no knowledge of the libellous nature of its contents, he is entitled to be acquitted; *e.g.* where a postman or messenger innocently carries a sealed letter or parcel containing libellous words (*R. v. Topham*, 1791, 4 T. R. 129; *Day v. Bream*, 1837, 2 Moo. & R. 55); or where the defendant cannot read (*R. v. Holt*, 1793, 5 T. R. 444); or where the libel was printed in Latin, a language which the defendant did not understand (*R. v. Wiatt*, 1722, 8 Mod. 123). If a man receives a letter, opens it, and reads it aloud to his family, having no previous knowledge of its contents, he will not be liable to a prosecution, even though it prove to contain a libel (*John Lamb's case*, 1610, 9 Rep. 60). And where the defendant had read the libel, yet if the words were innocent on the face of them, and only derived a defamatory meaning from certain extrinsic facts and circumstances wholly unknown to him, then he would still be unconscious that what he published was a libel, and such a publication would be no crime; *e.g.* where the libel was contained in an allegory or a riddle, to which the defendant had no clue. Again, where the defendant was in possession of a paper which he knew to be libellous, and handed it inadvertently to a third person in mistake for some other paper, he was held not to be criminally liable for such an accident, though he would probably be liable in a civil case. "The delivering it by mistake is no publication" (*R. v. Paine*, 1695, 5 Mod. at p. 167; Carth. 405; and see the *dicta* of Lord Kenyon in *R. v. Topham*, 1791, 4 T. R. 129; and in *R. v. Lord Abingdon*, 1794, 1 Esp. 228; and the ruling of Abbott, C.J., in *R. v. Harvey*, 1823, 2 Barn. & Cress. 257).

(ii.) *Attempts to Publish*.—In a civil action, as we have seen, the plaintiff must show an actual publication accomplished, not merely an intention to publish; otherwise no injury would be done to the plaintiff's reputation. Nor can criminal proceedings be taken for a mere intention to publish, which has not yet led to any act: *mens rea* alone is not sufficient. But if a man has the intention of publishing a libel, and does any overt act or takes any decided step towards its publication, he is guilty of *an attempt* to publish a libel, which is a misdemeanour, punishable on an indictment for libel. Thus if the defendant sends a libel to a printer to be printed, or even prints copies of it himself with a view to publication, he commits a criminal offence (*R. v. Paine*, 1695, 5 Mod. 163; Carth. 405; Comb. 358; *R. v. Lovett*, 1839, 9 Car. & P. 462). But merely to be in possession of a copy of a libel is no crime, until some attempt is made to publish it (*R. v. Beere*, 1698, Carth. 409; 1 Raym. (Ld.) 414; *John Lamb's case*, 1610, 9 Rep. 60). By a statute of George III., now repealed, the proprietor of every newspaper was required to send a copy of each issue of his paper to the Stamp Office for revenue purposes; and it was held that proof of the delivery of a newspaper to the officer at the Stamp Office was evidence of the publication of a libel con-



tained in it sufficient to support an indictment against the proprietor, "inasmuch as the officer of the Stamp Office would at all events have an opportunity of reading the libel himself." It was not necessary for the prosecution to prove that the officer had in fact read it (*R. v. Amphlit*, 1825, 4 Barn. & Cress. 35; 6 Dowl. & Ry. 125; cp. *Mayne v. Fletcher*, 1829, 9 Barn. & Cress. 382; 4 Man. & R. 312).

(iii.) *Publication to the Prosecutor himself*.—In civil actions, as we have seen, the plaintiff must prove a publication to some third person, as without that there is no injury done to his reputation. But a libel which is published only to the person defamed endangers the peace and good order of society, just as much as, probably more than, a libel addressed to a third person. Hence in criminal proceedings it is sufficient for the Crown to prove a publication to the prosecutor alone, provided the words are calculated to provoke him to a breach of the peace (*R. v. Brooke*, 1856, 7 Cox C. C. 251; *R. v. Adams*, 1888, 22 Q. B. D. 66). It is not necessary for the prosecutor to show that his reputation has been injured; for he is not claiming damages for himself, but seeking only to promote the interests of the public.

(iv.) *Master and Servant*.—In both civil and criminal proceedings it was the rule at common law that a master was liable for all acts of his servant done in the ordinary course of that servant's employment and in pursuance of the master's orders, expressed or implied. This rule pressed very hardly on the proprietor of a newspaper. He was not only liable in damages, but he was also *criminally* liable, if his editor permitted a libel to appear in the paper, although he himself had never seen it (*R. v. Walter*, 1799, 3 Esp. 21), and although he had expressly directed his editor never to publish libellous matter. Hence Lord Campbell inserted in his Libel Act (6 & 7 Vict. c. 96) a clause—now sec. 7—which enables the proprietor of a newspaper in which a libel has inadvertently appeared, to prove that such publication was made without his authority, consent, or knowledge, and did not arise from want of due care or caution on his part. Such proof is now an answer to an indictment, though it is still no defence to a claim for damages (see *R. v. Holbrook*, 1877, 3 Q. B. D. 60; 1878, 4 Q. B. D. 42; *Ex parte Parry*, 1877, 41 J. P. 85; *R. v. Bradlaugh and Others*, 1883, 15 Cox C. C. 217; *R. v. Allison, Judd, and Others*, 1888, 37 W. R. 143; 59 L. T. 933).

**Public Auction.**—See AUCTION.

**Public Authorities Protection Act.**—The Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), was passed in order to generalise and amend various statutory provisions for the protection of persons acting in the execution of statutory and other public duties.

Sec. 1 provides that where any action, prosecution, or other proceeding is commenced against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty, or authority—(a) the action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months after the act, neglect, or default complained of, or, in case of a continuance of injury or damage, within six months after the ceasing thereof; (b) wherever in any such action a judgment is obtained by the defendant,



it shall carry costs as between solicitor and client (see *Harrop v. Mayor of Ossett*, [1898] 1 Ch. 525); (c) where the proceeding is an action of damages, tender of amends before the action was commenced may be pleaded in lieu of or in addition to any other plea; and if the action was commenced after the tender, or is proceeded with after any payment into Court, and the plaintiff does not recover more than the sum tendered or paid, he shall not recover any costs incurred after the tender or payment, and the defendant shall be entitled to costs as between solicitor and client as from the time of the tender or payment; but this provision shall not affect costs on any injunction in the action; (d) if, in the opinion of the Court, the plaintiff has not given the defendant a sufficient opportunity of tendering amends before the commencement of the proceeding, the Court may award to the defendant costs as between solicitor and client. The section does not affect any proceeding by a Government department against any local authority or officer of a local authority (*ibid.*).

Sec. 2 repealed so much of every general public Act as enacted, that in any proceeding to which the Act of 1893 applies, the proceeding should be commenced in any particular place or within any particular time, or notice of the action should be given, or the defendant should be entitled to any particular kind or amount of costs, or the plaintiff be deprived of costs in any specified event; and repealed specifically a large number of enactments specified in the schedule to the Act to the extent mentioned in such schedule.

**Public Baths.**—See BATHS AND WASHHOUSES.

**Public Body.**—According to the Public Bodies Corrupt Practices Act, 1889, s. 7, “the expression ‘public body’ means any council of a county or county of a city or town, any council of a municipal borough, also any board, commissioners, select vestry, or other body which has power to act under and for the purposes of any Act relating to local government, or the public health, or to poor law, or otherwise to administer money raised by rates in pursuance of any public general Act, but does not include any public body as above defined existing elsewhere than in the United Kingdom.” This definition includes all sanitary authorities, urban and rural.

**Public Bridge.**—All public bridges are *prima facie* repairable by the inhabitants of the county, without distinction of foot, horse, or carriage bridges, unless they can show that others are bound to repair particular bridges (*R. v. Salop*, 1810, 13 East, 95; 12 R. R. 307). A bridge of public utility, built by an individual, dedicated to and accepted by the public, is a public bridge (*R. v. Yorkshire W. R.*, 1802, 2 East, 342; 6 R. R. 439). With reference to the Statute of Bridges (22 Hen. VIII. c. 5), Lord Ellenborough said, in the case of *R. v. Bucks*, 1810, 12 East, 192; 11 R. R. 347: “If the meaning of the words ‘public bridge’ could properly be derived from any other less authentic source than the statutable one I have mentioned, they might safely be defined to be such bridges as all His Majesty’s subjects had used freely and without interruption as of right, for a period of time competent to protect them and all who should thenceafter use them, from being considered as



wrong-doers in respect of such use, in any mode of proceeding, civil or criminal, in which the legality of such use might be questioned." Where an objection was taken to an indictment for non-repair of a bridge that it did not show that the bridge was in a highway, Rolle, J., said: "The indictment doth say it is a common bridge, and that is enough, and it is needless to say it is in the highway" (*R. v. Sir H. Spiller*, 1649, Sty. 108).

Lord Rolle (1 Rolle, *Abr.* 368) states that "if a man erect a mill for his own profit, and make a new cut for the water to come to it, and make a new bridge over it, and the subjects go over this as over a common bridge, this bridge ought to be repaired by him who has the mill, and not the county, because he erected it for his own benefit"; but Lord Ellenborough questioned this statement in *R. v. Kent*, 1814, 2 M. & S. 513; 15 R. R. 330. He said: "The authorities from first to last are uniform, and establish the case (*R. v. Yorkshire W. R.*, 1770, 5 Burr. 2594) as cited by Northey, Attorney-General, in *R. v. Inhabitants of Wilts*, 1793, 1 Salk. 359, that if a private person build a private bridge which afterwards becomes of public convenience, the county is bound to repair it." Where a bridge was built for the convenience of an individual, but was afterwards used by the public for fifty years, it was held to be repairable by the county (*R. v. Glamorgan*, 1802, 2 East, 356 n.; 6 R. R. 450 n). But Lord Coleridge, C.J., in *R. v. Inhabitants of Southampton*, 1887, 19 Q. B. D. 601, says: "If a private bridge has been built by a private man for his private ends, and it turns out in course of time to be useful to the public and to be used by the public, those facts are strong and cogent (although not necessarily conclusive) evidence upon which a jury would be warranted in finding the adoption of the bridge by the county, and consequent liability of the county to repair." In *Robbins v. Jones*, 1863, 15 C. B. N. S. 240, Erle, C.J., said: "It is familiar law, that a bridge made by a private individual for his own benefit at an ancient ford, if useful to the public, is to be repaired by them, and not by the builder" (see also *R. v. Marquis of Buckingham*, 1815, 4 Camp. 189; *R. v. Oxfordshire Inhabitants*, 1825, 4 Barn. & Cress. 194).

Bovill, C.J., in *R. v. Chart & Songbridge*, 1870, 22 L. J. N. S. 416, says: "The words 'county bridge' is not a term known to the law, but is merely a compendious word for a public bridge. There may be a liability on the part of the inhabitants of the hundred, or a division of the county, or of the inhabitants of the county, to repair a bridge. There is no difference in principle; all bridges over a stream are county bridges, although repairable by a hundred or division of the county." See HIGHWAYS, vol. vi. p. 194.

**Public Building.**—By the London Building Act, 1894, "the expression 'public building' means a building used, or constructed, or adapted to be used as a church, chapel, or other place of public worship, or as a school, college, or place of instruction (not being merely a dwelling-house so used), or as a hospital, workhouse, public theatre, public hall, public concert-room, public ball-room, public lecture-room, public library, or public exhibition-room, or as a public place of assembly, or used, or constructed, or adapted to be used for any other public purpose: also a building used, or constructed, or adapted to be used, as an hotel, lodging-house, home, refuge, or shelter, where such building extends to more than 250,000 cubic feet, or has sleeping accommodation for more than



one hundred persons." Where it is proposed to convert or alter any building erected for a purpose other than a public purpose, into a public building, such conversion or alteration must be carried into effect, and the public building thereby formed, including the walls, roofs, floors, galleries, and staircases thereof, must be constructed in such manner as may be approved by the district surveyor, or, in case of disagreement, may be determined by the tribunal of appeal provided by this Act (s. 79). Sec. 80 deals with the making of proper staircases and means of exit. See also Public Health Acts, 1875 to 1890.

A union workhouse is a "public building," for the purpose of rating under a local improvement Act (*Bedford Union v. Bedford Improvement Commissioners*, 1852, 21 L. J. M. C. 229); and so is an infirmary. But an ambulance is not a "public building" within the Metropolitan Building Acts, so as to require deposit of plans, etc. (*Josoline v. Meeson*, 1885, 53 L. J. 319).

**Public Business.**—Where there was a covenant in a lease not to carry on upon the demised premises any public trade or business, and to occupy and use the premises as a private dwelling-house only, it was held, in the case of *Wickenden v. Webster*, 1856, 25 L. J. Q. B. 264, that it was a breach of the covenant for the lessee to carry on a day-school where also dancing-classes were held once or twice a-week.

As regards exemption from distress of goods delivered to a person in the way of his trade, it was first laid down in *Gisbourn v. Hurst*, 1710, 1 Salk. 249, and adopted by Willes, C.J., in *Simpson v. Hartopp*, 1744, Willes, 514, that "those goods are privileged which are delivered to any person exercising a public trade or employment to be carried, wrought, or managed in the way of his trade or employ" (*Muspratt v. Gregory*, 1836, 1 Mee. & W. 653; see also *Clarke v. Millwall Dock Co.*, 1886, 17 Q. B. D. 494). But Patteson, J., in *Gibson v. Treson*, 1842, 3 Q. B. 44, said, "I do not know what is meant by a public trade." The difficulty has always been in ascertaining whether the goods in each particular case were so circumstanced as to fall within the phrase "public trade." The following, however, are within the rule:—Cloth bailed to a tailor to make a garment; yarn delivered to a weaver to be woven (*Wood v. Clarke*, 1831, 1 Crompt. & J. 484); a horse standing in a smith's shop to be shod; corn sent to a mill to be ground (*Co. Litt.* 47 a); or goods delivered to a common carrier for the purpose of conveyance (*Gisbourn v. Hurst*, *supra*; see also *Brown v. Sheril*, 1834, 2 Ad. & E. 138.). Where an agent under an agreement with a firm of carpet manufacturers took premises, and put his principal's name outside as well as his own, and was entitled to carry on other agency business, but was in fact agent for only one other firm, it was held, in *Tapling v. Weston*, 1883, 1 C. & E. 99, that the agent was not carrying on a "public trade," so as to exempt his principal's goods on his premises from distress (see also *Findon v. M'Laren*, 1845, 6 Q. B. 891; *Gilman v. Elton*, 1821, 3 B. & B. 75; *Matthias v. Mesnard*, 1826, 2 Car. & P. 353).

**Public Carriage.**—A public conveyance appears to be one which plies openly and publicly for passengers. Where the 53 & 54 Vict. c. 34 is adopted, sec. 11 provides "that any person who hires or uses a public conveyance other than a hearse, for the conveyance of the body of a person



who has died from any infectious disease, without previously notifying to the owner or driver of such public conveyance that the person whose body is, or is intended to be conveyed, has died from infectious disease, and after any such notification as aforesaid, any owner or driver of a public conveyance other than a hearse, which has been used for conveying the body of a person who has died from infectious disease, who shall not immediately provide for the disinfection of such conveyance, shall be guilty of an offence under this Act." There is a similar provision in the Public Health Act, 1875, respecting persons who enter public conveyances when suffering from infectious diseases (s. 126). In both these cases the person who engages, as well as the person who owns the carriage, are liable to a penalty not exceeding £5, and no owner is required to convey any person so suffering until he has been paid a sum sufficient to cover any loss or expense incurred by him in carrying into effect the provisions of the Act.

With respect to the liability of jobmasters for defects in their conveyances, the law is laid down by Lindley, J., in *Hyman v. Nye*, 1881, 6 Q. B. D. 685, as follows:—"A person who lets out carriages is not, in my opinion, responsible for all defects, discoverable or not; he is not an insurer against all defects; nor is he bound to take more care than coach proprietors or railway companies, who provide carriages for the public to travel in; but in my opinion he is bound to take as much care as they, and although not an insurer against all defects, he is an insurer against all defects which care and skill can guard against. His duty appears to me to be to supply a carriage as fit for the purpose for which it is hired as care and skill can render it; and if, whilst the carriage is being properly used for such purpose, it breaks down, it becomes incumbent on the person who has let it out to show that the break-down was, in the proper sense of the word, an accident not preventable by any care or skill."

**Public Chapels.**—In some parishes, besides the parish church, chapels were at an early period founded in which divine service might be lawfully celebrated; and of such chapels there are various kinds. Some are *private*, being erected for the use only of particular persons of rank, while others are *public*, and designed for the benefit of particular districts lying within the parochial ambit, whence they are termed *chapels of ease* (see 2 Steph. Com. 755).

The Act 3 & 4 Will. iv. c. 30 exempts from poor and church rates all churches, chapels, and other places of religious worship (see PUBLIC BUILDING).

**Public Charity.**—"I am of opinion," said Lord Hardwicke in *A.-G. v. Pearce*, 1740, 2 Atk. 87, "that the word *public* was meant only by way of description of the nature of them, and not by way of distinguishing one charity from another; for it would be almost impossible to say which are public and which are private in their nature. The charter of the Crown cannot make a charity more or less public, but only more permanent than it would otherwise be, but it is the extensiveness which will constitute it a public one." See also *St. Thomas's Hospital v. Lambeth*, 1875, 45 L. J. M. C. 23; *R. v. Stapleton*, 1863, 33 L. J. M. C. 17, with respect to the rateability of public charities.



**Public Company.**

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[NOTE.—In this article the sections referred to are those of the *Companies Clauses Act, 1845*, except where the contrary is expressly mentioned.]

Prior to 1845, every special Act of Parliament by which any company was incorporated for carrying on an undertaking of a public nature, itself contained all the necessary provisions with respect to the constitution and powers of the company. In that year the *Companies Clauses Act* (8 Vict. c. 16) was passed, consolidating the provisions usually inserted in the special Acts with respect to the constitution and management of such companies, and so forming a general code, to be as far as practicable of universal application. In the same year, the *Lands Clauses Act* (8 Vict. c. 18) similarly consolidated the provisions usually inserted in Acts authorising the taking of lands for undertakings of a public nature, and the *Railways Clauses Act* (8 Vict. c. 20), the provisions usually inserted in Acts authorising the making of railways. The provisions of the *Companies Clauses Act, 1845*, apply to every company incorporated by special Act for carrying on an undertaking of a public nature, except so far as they are expressly varied or excluded by the special Act; but they have no application to companies registered under the *Companies Acts, 1862 to 1890*, as to which the reader is referred to the article entitled COMPANY. The *Companies Clauses Act, 1863* (26 & 27 Vict. c. 118), contains certain supplementary provisions, which, however, generally speaking, apply only so far as they are expressly incorporated by the special Act. As to the *Lands Clauses* and *Railways Clauses Acts* respectively, see LANDS CLAUSES ACTS; RAILWAY.

*Distribution of Capital into Shares.*—The capital of the company is divided into shares of the number and amount prescribed by the special Act, and such shares must be numbered in arithmetical progression (s. 6). The shares are personal estate and transmissible as such (s. 7). Every person who has subscribed the prescribed sum or upwards to the capital of the company, or has otherwise become entitled to a share in the company, and whose name has been entered on the register of shareholders, is deemed to be a shareholder (s. 8). The company must keep a "Register of Shareholders," in which the names of all shareholders must be entered, together with the number of shares to which they are respectively entitled, distinguishing each share by its number; and the register must from time to time, at each ordinary meeting of the company, be authenticated by the common seal of the company (s. 9). A "Shareholders' Address Book" must also be kept, and may be perused at all convenient times by any shareholder (s. 10). The holder of any share may require from the company a certificate of the proprietorship of such share, under its common seal; and such a certificate is *prima facie* evidence of title; but the want of it does not



prevent the holder of any share from disposing thereof (ss. 11 and 12). A certificate which is lost or destroyed or damaged may be renewed (s. 13).

*Consolidation of Shares into Stock.*—Paid-up shares in the capital of the company may from time to time, with the consent of three-fifths of the shareholders present at a general meeting, be converted into a general capital stock; and the holders of such stock may transfer their respective interests therein in the same manner and subject to the same regulations as in the case of shares (ss. 61, 62). A "Register of Holders of Consolidated Stock" must be kept, and be accessible to all holders of shares or stock at all reasonable times (s. 63). The holders of stock are entitled to participate in dividends, and to the same privileges and advantages as would be conferred by shares of equal amount (s. 64).

*Transfer and Transmission of Shares.*—The shares in the company may be transferred by deed, in which the consideration must be duly stated; but no shareholder is entitled to transfer any share until he has paid all calls for the time being due on every share held by him (ss. 14, 16). The deed of transfer must be delivered to the secretary, who must enter a memorial thereof in the "Register of Transfers," and, on the request of the transferee, either deliver a new certificate to him or make an indorsement of the transfer on the old one, at the option of the transferee. Until the transfer has been delivered to the secretary, the transferor continues liable for any calls on the share, and the transferee is not entitled to receive dividends or vote (s. 15).

In the event of the transmission of a share by death or bankruptcy, the directors may require such transmission to be authenticated by a declaration in writing, which must be left with the secretary; and in the case of transmission by death, the probate or letters of administration must be produced to the secretary, together with the declaration. The person claiming by virtue of the transmission is not entitled to receive dividends or vote until such transmission has been duly authenticated (ss. 18, 19). The company is not bound to recognise any trust to which shares may be subject; and where any share stands in the names of more persons than one, the receipt of any one of those persons is a sufficient discharge to the company for any dividend or other sum payable in respect of the share (s. 20).

*Payment of Calls.*—The company may from time to time make calls upon the shareholders in respect of the amount unpaid on their shares, provided that not less than twenty-one days' notice be given of each call, and that the calls be made in accordance with the provisions, if any, of the special Act (s. 22). Under this section a call may be made payable by instalments (*North-Western Rwy. Co. v. M'Michael*, 1851, 6 Ex. Rep. 273). The company may sue and recover from any shareholder the amount of any call for which he is liable and which he fails to pay on the day appointed, with interest from the day on which the call was payable; and may allow interest to any shareholder who pays subscriptions before call (ss. 23–25). In an action for any call it is sufficient for the company to prove that at the time of making the call the defendant was a shareholder, and that the call was in fact made, and due notice thereof given; and the production of the register of shareholders is *prima facie* evidence of the defendant being a shareholder, and of the number and amount of his shares (ss. 26–28). The legal personal representatives of a deceased shareholder are liable for calls on his shares (s. 21).

*Forfeiture and Surrender of Shares.*—If a shareholder fails to pay any call payable by him, together with any interest which may have accrued



thereon, the directors, at any time after the expiration of two months from the day appointed for payment of the call, may declare the share in respect of which it was payable forfeited, and that whether the company has sued for the amount of the call or not (s. 29). Before declaring any share forfeited, the directors must give not less than twenty-one days' notice to the shareholder that such is their intention (s. 30); and the declaration of forfeiture does not take effect so as to authorise the sale or other disposition of any share, until the declaration has been confirmed at a general meeting, to be held not less than two months after the day on which such notice was given (s. 31). After the confirmation of the forfeiture, the directors may sell the forfeited share, and if more than one, either together or separately; and any shareholder may purchase any share so sold (s. 32); but no more shares of any defaulter may be sold than appear to be sufficient to pay the arrears due from him, together with interest and expenses (s. 34); and if payment of the arrears, interest, and expenses be made before sale, the forfeited shares revert to the defaulter (s. 35).

Where the special Act incorporates Part I. of the Companies Clauses Act, 1863, and the directors are unable to sell any share which has been duly forfeited in accordance with the above provisions for a sum equal to the arrears of calls, interest, and expenses due in respect thereof, the company, at any general meeting held not less than two months after notice of the forfeiture was given, may resolve that the share instead of being sold shall be cancelled; and upon such resolution the holder of the share is precluded from all interest therein, but the cancellation does not affect his liability to pay to the company the arrears of calls, interest, and expenses due in respect of the share, after deducting therefrom the value of the share at the time of the cancellation (26 & 27 Vict. c. 118, ss. 3-7). The company also has power, where Part I. of the Act of 1863 is incorporated, to accept a surrender of, or cancel with the consent of the holder, any share which is not fully paid up, and to issue new shares in lieu of any shares which have been cancelled or surrendered; but it may not pay or refund any sum of money for or in respect of the cancellation or surrender of any share (*ibid.* ss. 8-11).

*Borrowing Money on Mortgage or Bond.*—The company has no power to borrow money except to the extent to which it is authorised to do so by the special Act. But money borrowed for the purpose of paying off bonds or mortgages duly given by the company is, so far as it is so applied, deemed to be money borrowed within, and not in excess of, its statutory powers (32 & 33 Vict. c. 48, s. 4). Where the company is authorised by the special Act to borrow money on mortgage or bond, it may, subject to the restrictions contained in the special Act, borrow on mortgage or bond such sums as from time to time by an order of a general meeting are authorised to be borrowed, not exceeding in the whole the sum prescribed by the special Act; and for securing repayment, with interest, may mortgage the undertaking, and the future calls on the shareholders (s. 38). Any money borrowed and paid off may be again borrowed from time to time, but, except where the money is reborrowed in order to pay off an existing mortgage or bond, only with the authority of a general meeting (s. 39). Every mortgage and bond for securing money borrowed must be by deed under the common seal of the company, and the consideration must be truly stated therein (s. 41). The respective mortgagees or obligees have no preference one above another by reason of priority of the date of any such mortgage or bond, or of the meeting at which it was authorised (ss. 42, 44). And no such mortgage (though it comprise future calls), unless expressly so provided, precludes the com-



pany from receiving and applying to the purposes of the company any calls it may make (s. 43). A mortgage or bond may be transferred by deed (s. 46). The secretary must keep a register, and make a memorial therein of all mortgages and bonds, and transfers thereof, and such register may be perused at all reasonable times by any shareholder or any person interested in any such mortgage or bond (ss. 45, 47).

The interest on the moneys borrowed must be paid at the periods appointed, or if no period be appointed, half-yearly, in preference to any dividends payable to shareholders (s. 48). Such interest can only be transferred by deed (s. 49). A period for repayment of the principal may be fixed by the company and inserted in the mortgage deed or bond (s. 50). Where no period is fixed, the party entitled to the mortgage or bond may demand repayment, or the company may pay off the money borrowed, at any time after the expiration of twelve months from the date of the mortgage or bond, upon giving six months' previous notice in writing for that purpose (s. 51). The respective mortgagees and bond creditors have a right to inspect the books of account of the company at all reasonable times (s. 55). As to the appointment of a receiver to enforce payment of arrears of interest or principal, see secs. 53 and 54.

*Debenture Stock.*—A company which is authorised by its special Act to borrow money on mortgage or bond may, with the sanction of such proportion of the votes of shareholders, present at a meeting specially convened for the purpose, as is prescribed in the special Act, and if no proportion is prescribed, then of three-fifths of such votes, from time to time raise the money by the creation and issue of debenture stock instead of on mortgage or bond, and may attach to the stock so created such fixed and preferential interest as it thinks fits (26 & 27 Vict. c. 118, s. 22, as amended by 32 & 33 Vict. c. 48, ss. 1–3). Debenture stock, with the interest thereon, operates as a charge upon the undertaking of the company, prior to all shares or stock of the company, and is transmissible and transferable as personal estate in the same manner and subject to the same regulations as other stock; and the interest thereon has priority of payment over all dividends or interest on any shares or stock of the company, and ranks next to the interest on mortgages or bonds legally granted before the creation of such debenture stock; but the holders of debenture stock issued under the same special Act (see *In re Mersey Rwy. Co.*, [1895] 2 Ch. 287) are not entitled to any preference or priority as among themselves (26 & 27 Vict. c. 118, ss. 23, 24). If the interest on debenture stock be in arrear for thirty days, payment of the arrears may be enforced either by action or by the appointment of a receiver (*ibid.* ss. 25–27).

A register must be kept by the company of all debenture stock issued, and every holder of such stock is entitled to a certificate from the company stating the amount thereof held by him (*ibid.* ss. 28, 29); but no such holder is entitled to be present or vote at meetings of the company (*ibid.* s. 31). Bonds and mortgages given prior to the creation of debenture stock are not affected by the issue of such stock; and money raised by the issue thereof must be applied exclusively in paying off money due by the company on mortgage or bond, or for the purposes to which it would have been applicable if it had been borrowed on mortgage or bond; and the borrowing powers of the company are, to the extent of the money so raised, extinguished (*ibid.* ss. 30, 32, 34). Separate and distinct accounts must be kept by the company, showing how much money has been received on account of debenture stock, and how much money borrowed on mortgage or bond, or which the company has



power so to borrow, has been paid off by debenture stock or raised thereby (*ibid.* s. 33).

The above provisions with regard to debenture stock apply also to mortgage preference stock and funded debt (*ibid.* s. 34).

The Railway Companies Securities Act, 1866 (29 & 30 Vict. c. 108), contains special provisions as to bonds, mortgages, debenture stock, and other securities of railway companies (see RAILWAY).

*Additional Capital.*—Unless it is otherwise provided by the special Act, the company may, with the authority of a general meeting, raise the sum which it is by the special Act authorised to borrow, or any part thereof, by creating new shares of the company, instead of borrowing the same; the capital raised by the creation of the new shares to be considered as part of the general capital (ss. 56, 57). If at the time of the creation of new shares the existing shares are worth more than their nominal value, the new shares must be offered to the shareholders in proportion to their holdings in the existing shares, and those which are not accepted may be disposed of by the company (ss. 58, 59). Where the existing shares are not worth more than their nominal value, the new shares may be issued on such terms as the company thinks fit (s. 60).

Where the company is authorised by a special Act incorporating Part II. of the Companies Clauses Act, 1863, to raise additional capital by the issue of new ordinary shares or stock, it may, with the sanction of such proportion of the votes of shareholders, present at a meeting specially convened for the purpose, as is prescribed in the special Act, and if no proportion is prescribed, then of three-fifths of such votes, from time to time create and issue such new ordinary shares or stock (as the case may be) as it thinks fit, for the purpose of raising such additional capital (26 & 27 Vict. c. 118, s. 12). Where it is authorised to raise additional capital by the issue of new preference shares or stock, it may, in like manner, and with the like sanction, create and issue such new shares or stock, either ordinary or preference, and either of one class with like privileges, or of several classes with different privileges, and with any fixed, fluctuating, contingent, preferential, perpetual, terminable, deferred or other dividend or interest not exceeding the rate prescribed in the special Act, and if no rate is prescribed, then not exceeding the rate of 5 per cent. per annum; but the rights of existing preference shareholders are not affected by any preference assigned to the new shares or stock (*ibid.* s. 13). Holders of preference shares or stock are only entitled to receive dividends or interest out of the profits of each year, and are not entitled to have any deficiency made up out of the profits of any subsequent year (*ibid.* s. 14). If the existing ordinary shares are at a premium, the new shares or stock must be offered at par to the existing shareholders in proportion to their holdings (*ibid.* ss. 17–20). Subject to this, the company may issue the new shares or stock at a discount, or otherwise dispose thereof on such terms and conditions and in such manner as the directors think most advantageous to the company (*ibid.* s. 21, as amended by 32 & 33 Vict. c. 48, s. 5).

Railway companies may obtain authority to raise additional capital by certificate from the Board of Trade instead of by a special Act (27 & 28 Vict. c. 120), and may, under certain circumstances, divide their paid-up ordinary stock into preferred and deferred ordinary stock (31 & 32 Vict. c. 119, s. 13) (see RAILWAY).

*Application of Funds.*—All money raised by the company, whether by subscriptions of the shareholders, or by loan or otherwise, must be applied, first in paying the costs and expenses incurred in obtaining the special Act



and all expenses incident thereto; and secondly, in carrying the purposes of the company into execution (s. 65). An application of the funds of the company for any other purpose is a misfeasance, for which the directors are personally liable.

*General Meetings.*—The first general meeting of shareholders must be held within the time prescribed by the special Act, or, if no time be prescribed, within one month after the passing of the special Act; and future general meetings at the prescribed periods, and if no periods be prescribed, in February and August in each year, or at such other stated periods as are appointed by an order of a general meeting: such meetings are called “ordinary meetings” (s. 66). The directors may convene other general meetings, which are called “extraordinary meetings,” at such times as they think fit; and they may at any time be required to convene an extraordinary meeting by notice in writing under the hands of twenty or more shareholders holding in the aggregate not less than one-tenth of the capital; and if for twenty-one days after such notice the directors fail to call such meeting, the shareholders may themselves do so by giving due notice thereof (ss. 68, 70). Fourteen days’ public notice of all meetings, whether ordinary or extraordinary, must be given by advertisement, specifying the place, the day, and the hour of meeting; and every such notice must specify the purpose for which the meeting is called, except in the case of an ordinary meeting at which the only business to be done is such as is appointed by statute to be done at an ordinary meeting (ss. 67, 69, 71).

In order to constitute a meeting, where no quorum is prescribed by the special Act, there must be present shareholders holding in the aggregate not less than one-twentieth of the capital of the company, and being in number not less than twenty, or not less than one for every £500 of such required proportion of capital; and if a quorum is not present within an hour of the time appointed for the meeting, no business may be transacted other than the declaration of a dividend (s. 72). A meeting may be adjourned from time to time; but no business may be proceeded with at any meeting or adjournment thereof, except the business for which the meeting was convened (s. 74). At all general meetings every shareholder is entitled to vote according to the scale of voting prescribed by the special Act; and if no scale be prescribed, every shareholder has one vote for every share up to ten, and an additional vote for every additional five shares up to one hundred, and for every ten shares beyond the first hundred, and the chairman has a casting vote; but no shareholder may vote unless he has paid all calls due. Votes may be given either personally or by proxies, who must be shareholders and be appointed by writing (ss. 75–77). In the case of joint shareholders, the one whose name stands first in the register has alone the right to vote (s. 78). Lunatics and minors may vote by their committees and guardians (s. 79).

Whenever any particular majority of votes at any meeting is required in order to authorise any proceeding, proof of such majority is only required in the event of a poll being demanded at such meeting; and if such poll is not demanded, a declaration by the chairman that the resolution authorising the proceeding has been carried, and an entry to that effect in the minute-book, is sufficient authority for such proceeding, without proof of the number or proportion of votes recorded in favour of or against the same (s. 80).

*Appointment of Directors.*—The number of directors must be the number prescribed by the special Act; and where the company is author-



ised by the special Act to increase or reduce the number, it may from time to time, in general meeting, after due notice for that purpose, increase or reduce the number accordingly, and determine the order of rotation in which such reduced or increased number shall go out of office, and what number shall be a quorum at their meetings (ss. 81, 82). The directors appointed by the special Act continue in office until the first ordinary meeting held in the year next after that in which the special Act was passed; and at such meeting the shareholders may either continue them in office or may elect a new body of directors, the directors appointed by the special Act being eligible as members of such new body; and at the first ordinary meeting in every subsequent year the shareholders must elect persons to supply the places of directors then retiring (s. 83). If a quorum is not present at any meeting at which an election of directors ought to take place, the meeting stands adjourned to the following day at the same time and place; and if a quorum is not present at the adjourned meeting, the existing directors continue in office until new directors are appointed at the first ordinary meeting in the following year (s. 84).

*Qualification of Directors.*—Every director must be a shareholder, and must be possessed of the number (if any) of shares prescribed by the special Act, and must not hold an office or place of trust or profit under the company, nor be interested in any contract with the company. If any director subsequently to his election accepts or continues to hold any other office or place of trust or profit under the company, or is either directly or indirectly concerned in any contract with the company, or participates in any manner in the profits of any work to be done for the company, or ceases to hold the requisite number of shares, he thereupon ceases to be a director, and his office becomes vacant. This disqualification does not extend to a shareholder of an incorporated joint-stock company merely by reason of any contract entered into with such company; but no director, being a shareholder in any such company, may vote on any question as to a contract with such company (ss. 85–87). Where a director, in contravention of the above provisions, is personally interested in any contract with the company, such contract is not enforceable as against the company (*Aberdeen Rwy. Co. v. Blakie*, 1854, 2 Eq. Rep. 1281; *Flanagan v. G. W. Rwy. Co.*, 1868, 19 L. T. 345; *Great Luxembourg Rwy. Co. v. Magnay*, 1858, 25 Beav. 586).

*Rotation of Directors.*—The directors must retire from office at the times and in the proportions prescribed by the special Act; and if no number be prescribed, one-third of the directors must go out of office at the end of the first year, one-half of the remaining number at the end of the second year, and the remainder at the end of the third year, the persons to retire to be in each instance determined by ballot unless the directors otherwise agree. The places of the retiring directors must be filled up; and at the first ordinary meeting in every subsequent year, one-third of the directors, being those who have been longest in office, must go out of office and their places be supplied. Retiring directors are eligible for re-election (s. 88). If any director dies, resigns, or becomes disqualified or incompetent, or ceases to be a director by any other cause than that of going out of office by rotation, the remaining directors may elect a duly qualified shareholder to fill his place for so long as he would have been entitled to continue in office if he had not so ceased to be a director (s. 89).

*Powers of Directors.*—The directors have the management and superintendence of the affairs of the company, and may exercise all the powers of the company, except as to such matters as are required by statute to be



transacted by a general meeting; but the exercise of all such powers is subject to the control and regulation of any general meeting specially convened for the purpose (s. 90). Except as otherwise provided by the special Act, the choice and removal of the directors, and the increasing or reducing of their number, the choice of auditors, and the determination as to the remuneration of the directors, auditors, treasurer, and secretary, and as to the amount of money to be borrowed on mortgage, and as to the augmentation of capital and the declaration of dividends, are matters which may only be transacted at a general meeting (s. 91). A company incorporated by special Act has only such powers as are expressly or by implication conferred upon it by statute, and such powers only will be implied as are necessary for carrying out in the usual way the purposes for which the company was incorporated. Any act of the directors beyond the scope of such powers, whether sanctioned by the shareholders or not, is, so far as the company is concerned, void (see *Shrewsbury, etc., Rwy. Co. v. L. & N.-W. Rwy. Co.*, 1857, 6 Cl. H. L. 113; *Ashbury Carriage Co. v. Riche*, 1875, L. R. 7 H. L. 653; *Bateman v. Mid Wales Rwy. Co.*, 1866, L. R. 1 C. P. 499).

*Proceedings of Directors and Committees.*—The directors may appoint times for holding meetings, and may meet and adjourn as they think proper, and any two of them may at any time require the secretary to call a meeting of the directors. If no quorum is prescribed by the special Act, there must be present at least one-third of the directors to constitute a meeting; and all questions may be determined by a majority, the chairman having a casting vote in addition to his vote as a director (s. 92). The directors must annually appoint a chairman, and may also, if they think fit, appoint a deputy-chairman; and if at any meeting neither the chairman nor deputy-chairman is present, then the directors present must choose one of their number to be chairman of that meeting (ss. 93, 94).

The directors may appoint one or more committees, consisting of such number of directors as they think fit, and grant to such committees power on behalf of the company to do any acts which the directors could lawfully do (s. 95). The committees may meet and adjourn as they think proper, for carrying into effect the purposes of their appointment; and the quorum requisite to constitute a meeting, if not prescribed by the special Act, must be fixed by the general body of directors (s. 96). A committee must exercise in concert the powers intrusted to them, and cannot apportion them among themselves (*Cook v. Ward*, 1877, 2 C. P. D. 255).

Minutes or copies of all appointments, contracts, orders, and proceedings of all meetings of the company, and of the directors and committees, must be entered in books provided for the purpose, and kept under the superintendence of the directors; and such entries must be signed by the chairman of the meeting, and are then receivable as evidence, without proof of the meeting having been duly convened or held, or of the regularity in other respects of the proceedings, or of the signature of the chairman, all such matters being presumed until the contrary be proved (s. 98). It is sufficient if the minutes are confirmed and signed by the chairman at a subsequent meeting, provided the same person is chairman at both meetings (*L. B. & S. C. Rwy. Co. v. Fairclough*, 1841, 2 Man. & G. 674; *West London Rwy. Co. v. Bernard*, 1843, 3 Ad. & E. N. S. 873), but not otherwise (*Cornwall Lead Mining Co. v. Bennett*, 1860, 29 L. J. Ex. 157); and the minute-book is not the only evidence of the proceedings admissible (*Miles v. Bough*, 1842, 3 Ad. & E. N. S. 845).

All acts done by persons acting as directors are valid, notwithstanding



that it may be afterwards discovered that there was some defect in their appointment, or that they were disqualified (s. 99).

*Contracts, how entered into.*—The power of the directors, or of a committee of directors, to make contracts on behalf of the company, may be exercised as follows:—(1) With respect to any contract which, if made between private persons, would be by law required to be under seal, such contract may be made on behalf of the company under its common seal, and in the same manner be varied or discharged; (2) with respect to any contract which, if made between private persons, would be by law required to be in writing, and signed by the parties to be charged therewith, such contract may be made on behalf of the company in writing, signed by any two of the directors or committee, and in the same manner be varied or discharged; and (3) with respect to any contract which, if made between private persons, would by law be valid though made by parol only, and not reduced into writing, such contract may be made on behalf of the company by parol only, without writing, and in the same manner be varied or discharged (s. 97). These provisions constitute an important exception to the common law rule that all contracts by CORPORATIONS must be under their common seal.

*Personal Liability of Directors.*—No director, by being party to or executing in his capacity of director any contract or other instrument on behalf of the company, or otherwise lawfully executing any of the powers given to the directors, incurs any personal liability (s. 100). Directors may, however, incur personal liability by borrowing in excess of the company's borrowing powers (see *Cherry v. Colonial Bank*, 1869, 38 L. J. P. C. 49; *Firbank v. Humphreys*, 1886, 18 Q. B. D. 54; *Weeks v. Propert*, 1873, L. R. 8 C. P. 427; cp. *Beattie v. Ebury*, 1874, L. R. 7 H. L. 102) or otherwise acting in excess of their authority; or by contracting in their own names, though on behalf of the company (see *McCollin v. Gilpin*, 1881, 6 Q. B. D. 516; *Hancock v. Hodgson*, 1827, 12 Moo. K. B. 504; *Mare v. Charles*, 1856, 5 El. & Bl. 978; *Dutton v. Marsh*, 1871, L. R. 6 Q. B. 361; *Healey v. Storey*, 1848, 3 Ex. Rep. 3).

*Auditors.*—Except as otherwise provided by the special Act, the company, at the first ordinary meeting, must elect two auditors, one of whom must go out of office, and another be elected in his stead, at the first ordinary meeting in every subsequent year, the auditor so going out of office being re-eligible (ss. 101, 103). Every auditor must have at least one share in the undertaking, and must not hold any office in the company, nor be in any other manner interested in its concerns, except as a shareholder (s. 102). In the event of the failure of an ordinary meeting at which an auditor ought to be appointed, the same rules apply as in the case of the failure of a meeting at which directors ought to be chosen (s. 105); and a vacancy among the auditors during the current year may be supplied at any general meeting (s. 104). It is the duty of the auditors to receive from the directors the half-yearly or other periodical accounts and balance-sheet, and either to make a special report on such accounts or simply to confirm them, for which purpose they must examine the accounts, and may employ, at the expense of the company, such accountants and other persons as they think proper (ss. 106–108).

*Accountability of Officers.*—Before any treasurer, collector, or other officer intrusted with the custody or control of money enters upon his office, the directors must take sufficient security from him (s. 109); and every officer, when required, must render an account of all moneys received and payments made by him, and deliver the vouchers and receipts for such payments, and



pay over to the directors, or to any person appointed by them, any balance due (s. 110). If any officer fails to account, he may be summoned before two justices, who may hear and determine the matter in a summary way, and adjust the balance owing, and, in default of payment, may levy the amount by distress, or, in default thereof, commit the offender to gaol for not exceeding three months (s. 111). And if an officer refuses to deliver up any vouchers, receipts, books, or other property in his possession or power belonging to the company, the justices may commit him to gaol until he does deliver them (s. 112). Where there is good reason to believe that any such officer is about to abscond, a warrant for his arrest may be issued, instead of a summons (s. 113). And no such proceeding against any such officer deprives the company of any remedy which it may otherwise have against him, or any surety for him (s. 114).

*Accounts.*—The directors must cause accounts to be kept of all sums of money received or expended on account of the company by the directors and all persons employed by or under them (s. 115). The books must be balanced at the periods prescribed by the special Act, and, if no periods be prescribed, fourteen days at least before each ordinary meeting; and an exact balance-sheet must then be made up, exhibiting a statement of the capital, credits and property of, and debts due by, the company, and a distinct view of the profit or loss on the transactions of the preceding half-year, and must be examined by not less than three of the directors, and signed by the chairman or deputy-chairman (s. 116). The books and balance-sheet must (for the period prescribed, or) for fourteen days previous to each ordinary meeting, and for one month thereafter, be open for inspection by the shareholders; and the balance-sheet, together with the report of the auditors thereon, must be produced to the shareholders at such meeting (ss. 117, 118). A bookkeeper must be appointed to keep the books, and if he fails to permit any shareholder to inspect them, and to take copies or extracts therefrom, during the periods mentioned, he is liable to a penalty of £5 for every such offence (s. 119).

Special provisions with respect to the accounts of railway companies are contained in the Railways Clauses Act, 1845 (8 Vict. c. 20), s. 107; the Railway Companies Securities Act, 1866 (29 & 30 Vict. c. 108), ss. 5–11; and the Regulation of Railways Act, 1868 (31 & 32 Vict. c. 119), ss. 3–12; as to which, see RAILWAY.

*Dividends.*—Previously to every ordinary meeting at which a dividend is intended to be declared, the directors must cause a scheme to be prepared, showing the profits (if any) of the company for the period current since the preceding ordinary meeting at which a dividend was declared, and apportioning the same, or so much thereof as they may consider applicable to the purposes of dividend, among the shareholders, and must exhibit the scheme at such ordinary meeting, and at such meeting a dividend may be declared according to such scheme (s. 120). The company may not make any dividend whereby its capital stock will be in any degree reduced; and before apportioning the profits to be divided among the shareholders, the directors may, if they think fit, set aside a sum to meet contingencies, or for enlarging, repairing, or improving the works connected with the undertaking (ss. 121, 122). The payment of dividends out of capital is illegal, and the directors are jointly and severally liable to refund to the company the amount of any dividends so paid, with interest (*Burnes v. Pennell*, 1849, 2 Cl. H. L. 497; *Flitcroft's case*, 1882, 21 Ch. D. 519; *In re Bennett*, 1892, 8 T. L. R. 194; *In re Oxford Building Society*, 1886, 35 Ch. D. 502). No dividend may be paid in respect of any share until all calls then due on



every share held by the person to whom the dividend is payable have been paid (s. 123).

The 30th section of the Railway Companies Act, 1867 (30 & 31 Vict. c. 127), contains special restrictions with respect to the payment of dividends by railway companies.

*By-laws.*—The company may from time to time make by-laws under its common seal, for the purpose of regulating the conduct of its officers and servants, and for providing for the due management of its affairs; and may, by such by-laws, impose reasonable penalties, not exceeding £5 for any one offence, upon officers or servants offending against them; but the by-laws must be so framed as to allow the justice before whom any penalty is sought to be recovered, to order part only of such penalty to be paid (ss. 124–126). The production of a copy of the by-laws having the common seal affixed, is sufficient evidence of such by-laws in all prosecutions thereunder (s. 127).

*Access to Special Act.*—The company, at all times after the expiration of six months after the passing of the special Act, must keep in its principal office a copy of the special Act, printed by the Queen's printers; and where the undertaking is a railway, canal, or other like undertaking, the works of which are not confined to one town or place, must also deposit such a copy in the office of each of the clerks of the peace and town clerks of the several counties and boroughs into which or within a mile of which the works extend; and all persons interested must be permitted to inspect such copies, and make extracts or copies therefrom (s. 161). A company failing to keep or deposit any of such copies is liable to a penalty of £20 for every such offence, and also £5 for every subsequent day during which such copy is not so kept or deposited (s. 162).

[*Authorities.*—Lindley on *Companies*, 5th ed.; Brice on the *Doctrine of Ultra Vires*, 3rd ed.]

**Public Dancing-House.**—Within the administrative county of Middlesex any person who keeps or uses a place for public dancing, music, or other public entertainment of a like kind, without a licence from the County Council, or who commits any breach of the conditions of such a licence, is liable on summary conviction to certain pecuniary penalties (57 & 58 Vict. c. 15). In places outside the above limits licences are not required except under local Acts, or where the local authority has adopted the fourth part of the Public Health Acts Amendment Act, 1890. Under the latter Act the occupier of every house, room, garden, or other place kept or used for public music, dancing, singing, or other like entertainment, must procure a licence from the licensing justices within six months of the adoption of the Act. If the licence is refused the place is deemed a disorderly house, and the occupier is liable to a penalty of £5 for each day on which it is kept open.

Where any of the conditions upon which a licence is granted are disregarded, the holder is liable to a penalty of £20, and a daily penalty of £5, and the revocation of the licence. Offenders are to be proceeded against as under the Public Health Acts, but appeal lies to the Quarter Sessions against a conviction. Temporary licences for not more than fourteen days may be granted by the justices in Petty Sessions (see 25 Geo. II. c. 36) which extends to the area within twenty miles of London, but which is now repealed so far as Middlesex is concerned. In *Gregory v. Juffs*, 1833, 6 Car. & P. 271, it was held that a room used for public music or dancing



is within the Act 25 Geo. II. c. 36, although it is not exclusively used for those purposes, and although no money be taken for admission; but the mere accidental or occasional use of a room for either or both those purposes will not be within that statute. Proof that there is nothing painted on the house denoting that it is licensed under that statute is sufficient *prima facie* evidence in an action for penalties that it is unlicensed. In *Guaglieni v. Matthews*, 1865, 34 L. J. M. C. 116, it was held that the dancing need not be by the public, but that in order to bring an entertainment within the Act, the music and dancing must not be merely subsidiary, but must form a substantial part of the entertainment (see also *Syers v. Conquest*, 1878, 37 J. P. 342; *R. v. Tucker*, 1877, 46 L. J. M. C. 197; *Marks v. Benjamin*, 1839, 5 Mee. & W. 568). See PUBLIC ENTERTAINMENTS.

**Public Department** is a branch of the Government. See DEPARTMENT OF STATE.

**Public Drain.**—See *Coulton v. Ambler*, 1844, 13 Mee. & W. 403.

**Public Elementary School.**—See EDUCATION.

**Public Entertainments.**—In the interests of public order and morality, legislative control has been established over certain classes of entertainment provided for the public for money.

1. Intoxicating liquors may not be sold except by persons licensed. See INTOXICATING LIQUOR; LICENSING.

2. *Refreshments.*—Houses used for this purpose need an excise licence, even where intoxicants are not sold, or where foreign wines, sweets, made wines, mead, and metheglin are sold (23 & 24 Vict. c. 27; and see St. R. & O., Revised, vol. viii. p. 269). See REFRESHMENT HOUSE.

3. (a) Public music and dancing, and other public entertainments of the like kind are illegal if carried on within twenty miles of the cities of London and Westminster without a licence granted by the County Council of the district where they are so carried on.

The licences are granted annually by the Council in October, except in Middlesex, where they can be granted at any time (57 & 58 Vict. c. 18). Apparently any condition may be annexed to the licence (*R. v. West Riding County Council*, [1896] 2 Q. B. 386). Regulations have been passed by the London County Council as to the procedure on application. They are printed in Strong, *Dramatic and Musical Law*, 1898. The proceedings of the Council and its committees as to these licences are not judicial (*Ex parte Akkersdyke*, [1892] 1 Q. B. 170; *Royal Aquarium v. Parkinson*, [1892] 1 Q. B. 431).

In London, the buildings to be used must be certified in accordance with the Metropolitan Building Act, 1878, and the London Building Act, 1894, and the regulations made thereunder in 1897 (Glen, *London Building Acts*, p. 491). See LONDON COUNTY. Places which ought to have, but have not licences, are equally subject to those Acts and regulations (*R. v. Hannay*, [1891] 2 Q. B. 709).

Licensed places must have an inscription over them: "Licensed pursuant to Act of Parliament of the 25 Geo. II." A house or place kept or used



without a licence is a disorderly house: all persons found therein may be arrested under warrant, and the keeper is liable, in Middlesex, to a penalty of £5 a day, recoverable summarily (57 & 58 Vict. c. 15), and elsewhere the other punishments incurred by keeping a DISORDERLY HOUSE, and to forfeit £100, recoverable by action brought within six months of the offence (*Garrett v. Messenger*, 1867, L. R. 2 C. P. 583; 25 Geo. II. c. 36, ss. 2, 13).

The provisions of the Disorderly House Act, 1751, as to prosecution by parish authorities, apply to unlicensed places for music and dancing.

The Act does not apply to theatres carried on under letters patent or licence of the Crown, or of the Lord Chamberlain of the Royal Household (25 Geo. III. c. 36, s. 4; see *Gallini v. Laborie*, 1793, 5 T. R. 242; *R. v. Handy*, 1795, 6 T. R. 287). See THEATRE.

The places to which the Act applies include those in which public music or dancing, or like performances, are a substantial part of the entertainment offered, *e.g.* skating rinks where a band performs (*R. v. Tucker*, 1877, 2 Q. B. D. 417); and a house to which people are admitted for money to dance.

Licences may be granted for music only, or dancing only (*Brown v. Nugent*, 1872, L. R. 7 Q. B. 388), or subject to any condition which the Council thinks fit to impose as to licensing and regulating theatres. See THEATRE. Licences for dramatic performances cannot be granted under these Acts (*Levy v. Yates*, 1838, 8 Ad. & E. 129).

A licensed house must not be opened before noon (38 & 39 Vict. c. 21, s. 1) if also licensed for the sale of liquor, and must be closed at midnight, except when the time is extended under an occasional excise licence (38 & 39 Vict. c. 21, s. 1).

The licence is forfeited on breach of the provision as to inscription, or of the conditions annexed to it.

To warrant a conviction, the place must be knowingly, and in a sense *habitually*, kept for public entertainment, and admission. The receipt of money is material, but not essential (*Marks v. Benjamin*, 1839, 5 Mee. & W. 565; *Syers v. Conquest*, 1873, 21 W. R. 524).

(b) In those parts of England to which the Act of 1751 does not apply, the grant of music and dancing licences is regulated either by local Act (see *Hoffmann v. Bond*, 1875, 40 J. P. 5) or by Part iv. of the Public Health Act, 1890 (53 & 54 Vict. c. 59, s. 51), where that part has been adopted. The provisions are in substance the same as in London, but the licence is granted by licensing justices, and the penalties for breach of conditions are recoverable summarily as in Middlesex.

The conditions as to the structure of buildings so licensed depend on secs. 110, 111, 112 of the Towns Improvement Clauses Act, 1847.

4. As to public entertainments on Sundays, see SUNDAY.

5. The employment of young persons in public entertainments is regulated—(1) As to children of school age, by sec. 3 of the Prevention of Cruelty to Children Act, 1894 (57 & 58 Vict. c. 41); and

(2) As to girls under eight and boys under sixteen employed in dangerous performances, by the Dangerous Performances Acts of 1879 (42 & 43 Vict. c. 34) and 1897 (60 & 61 Vict. c. 51).

[*Authorities.*—Chit. *Stat. tit.* "Public Entertainment"; Geary on *Theatres and Music Halls*; Williamson on *Licensing*, 1898; Strong, *Dramatic and Musical Law*, 1898; Archibald, *Met. Police Guide*, 2nd ed., 1896.]

**Public Examination.**—See COMPANY.



**Public Funds**—The name given to the public funded debt due by Government. Soon after the Revolution of 1688, when the new connections of this country with the Continent introduced a new system of foreign politics, the expenses of the nation increased to an unusual degree, so that it was not thought advisable to raise all the expenses of any one year by taxes to be levied within that year. At first it was customary to borrow upon the security of some tax, or portion of a tax, set apart as a fund for discharging the principal and interest of the sum borrowed. This discharge was rarely effected. The public exigencies still continuing, the loans were continued, or the taxes again mortgaged for fresh ones. At length the practice of borrowing for a fixed period (*i.e.* upon *terminable* annuities) was abandoned, and henceforth loans were made upon *interminable* annuities, or until it might be convenient for Government to pay off the principal. See the National Debt Act, 1878 (33 & 34 Vict. c. 71).

“The Funds,” or “Government Funds,” or “The Public Funds,” must be taken to be synonymous, per Lord Cranworth in *Slingsby v. Grainger*, 1859, 28 L. J. Ch. 617. The term generally means funded securities guaranteed by the English Government, *i.e.* consols, reduced annuities, long annuities, or any other of the English funds (*Howard v. Kay*, 1858, 27 L. J. Ch. 448), but does not include foreign bonds guaranteed by England (*Burnie v. Getting*, 1845, 2 Coll. 324), nor bank stock, nor even unfunded exchequer bills (*Johnson v. Digby*, 1829, 8 L. J. Ch. O. S. 38).

**Public Garden.**—By the Town Gardens Protection Act, 1863 (26 & 27 Vict. c. 13), it is provided that where in any city or borough any enclosed garden or ornamental ground has been set apart in any public square, etc., for the use of the inhabitants, and where the trustees, etc., appointed for the care of the same have neglected to keep it in proper order, the Metropolitan Board of Works (now the County Council, by s. 40, subs. 8 of the Local Government Act, 1888), and the corporate authorities in any other city or borough, shall take charge of the same. See PLEASURE GROUNDS.

**Public Health.**—Legislation on this as on other subjects has been experimental and progressive. For a long time towns, and occasionally populous but unincorporated districts, used to apply to Parliament for special powers for such matters as drainage, water supply, and dealing with specific nuisances. The requirements of different localities of course varied, and the powers given by different local Improvement Acts varied accordingly in the most inconsistent and puzzling fashion. This was eventually recognised as being inconvenient, and in the year 1845 the system was adopted of grouping in general Acts the clauses which it was thought advisable to grant. Since that time the whole or parts of these Clauses Acts may be adopted in private Acts dealing with their subject-matter, but their provisions may not be departed from except for special reasons which Parliament recognises in each particular instance as adequate. Following out this plan, there were enacted in the year 1847 the Markets and Fairs Clauses Act (10 & 11 Vict. c. 14), the Gasworks Clauses Act (c. 15), the Commissioners Clauses Act (c. 16), the Waterworks Clauses Act (c. 17), the Towns Improvement Clauses Act (c. 34), the Cemeteries Clauses Act (c. 65), and the Towns Police Clauses Act (c. 89). None of these Acts were in force in any district until adopted there by a private Act, but



they provided the outline of a code by which effective means for the good government and sanitary regulation of a populous district could be secured.

*Public Health Act, 1848.*—In the next year, 1848, the first general Public Health Act (11 & 12 Vict. c. 63) was passed. A central controlling authority, the General Board of Health, was established for a term of five years (s. 4). On the petition of one-tenth of the ratepayers of any city, town, borough, parish, or place having a known or defined boundary, or without petition if the average death-rate appeared to be excessive, the General Board were empowered to hold a local inquiry as to the sewerage, drainage, water supply, and sanitary condition of the inhabitants (s. 8); and on their report Her Majesty was empowered by Order in Council to declare the whole or any part of the Act in force within such place (s. 10). The governing body was termed the Local Board of Health, but in boroughs the powers and duties of such Board were conferred on and discharged by the mayor, aldermen, and burgesses (s. 12). The Act gave powers for providing and regulating sewers and house drains, for street cleansing, dealing with offensive nuisances, unwholesome dwellings, slaughter-houses, unwholesome food, offensive trades, common lodging-houses, cellar dwellings, management of streets, public pleasure grounds, water supply, and burial. The sections dealing with these matters, though now repealed, have been re-enacted, with such modifications as experience has suggested, and they still form the basis of the law applicable to these matters. They are treated in this work under their various headings. The Act generally was intended to apply to populous places only; but a majority of the ratepayers of any parish or place having a population of less than 2000 could resolve to have any pool, etc., containing filth or anything of an offensive nature or likely to be prejudicial to health, drained or cleansed, or a sewer made or a well dug or pump provided for the public use of the inhabitants (s. 50). With this exception, no provision was made for the possible requirements of rural districts.

*Nuisances Removal Acts.*—Summary power to order the removal of nuisances likely to promote or increase disease was first given by statute in the year 1846 (9 & 10 Vict. c. 96). The Privy Council were empowered from time to time to give and issue orders for the prevention of contagious or epidemic diseases. The Act was temporary only. In 1848 it was renewed in more ample form (11 & 12 Vict. c. 123), but the parts dealing with nuisances were declared not to apply to places where the Public Health Act was in force (s. 5). This Act was amended in the next year (12 & 13 Vict. c. 111), and guardians of the poor, or other officers acting under the provisions of any local Act for the paving, cleansing, drainage, or lighting of any town or parish, were empowered to direct prosecutions. A machinery for dealing with nuisances in rural districts was thus provided. These Acts, however, were found to be defective, and were repealed and re-enacted in amended form in 1855 (18 & 19 Vict. c. 121), which itself was amended in many particulars in 1860 (23 & 24 Vict. c. 77). These Nuisances Removal Acts for a considerable period provided an important part of our sanitary laws. The authority to enforce them was the Board of Health, wherever the Public Health Act, 1848, was in force, elsewhere the corporation or Improvement Commissioners where such bodies existed, and where they did not, the Board of Guardians or overseers of the poor (Act of 1860, s. 2). These Acts gave summary powers for dealing with nuisances injurious to health; enabled the local authority to cover over any ditch, etc., which had become offensive; imposed heavy penalties on



persons engaged in the manufacture of gas who allowed water to become contaminated; gave means for dealing with certain noxious trades, if they caused a nuisance or were injurious to the health of the inhabitants of the neighbourhood; vested in the local authority all wells, etc., provided under sec. 50 of the Public Health Act, 1848, and further empowered them to keep in good repair and condition and free from pollution other wells, etc., dedicated to or open to the use of the inhabitants of their district; and, as amended by an Act of 1863 (26 & 27 Vict. c. 117, s. 2), gave large powers for inspection and seizure of unwholesome food.

*Diseases Prevention.*—This matter was dealt with by a separate Act in 1855 (18 & 19 Vict. c. 116). The Privy Council were again empowered by order to direct special provisions for the prevention of diseases to be put in force in England or in any part thereof. And after the issuing of such order, and while the same was in force, the General Board of Health were empowered from time to time as they should think fit to issue directions and regulations, and the local authority were required to see to their execution, appoint and pay such medical officers and other persons, and do and provide all such acts, matters, and things as should be necessary for mitigating the disease, or carrying out the directions and regulations. By the Nuisances Removal Act, 1860 (*supra*), the guardians were declared to be the local authority for this purpose.

The statutory powers for the appointment of the General Board of Health, originally granted for five years, were from time to time renewed and altered, but ultimately were allowed to lapse, and the Board came to an end in September 1858. Some of its functions were then transferred to the Privy Council (21 & 22 Vict. c. 97), and others devolved on the Home Secretary.

*Local Government Act, 1858.*—The Public Health Act, 1848, was considerably altered and amended by the Local Government Act, 1858 (21 & 22 Vict. c. 98). The two Acts were to be read together. In addition to the powers already given, the Act of 1858 empowered local authorities in certain cases to execute sanitary works outside their own district, and especially so to construct sewage outfall works; enabled them to regulate the construction of new buildings and new streets; incorporated certain provisions of the Towns Police Clauses Act and the Towns Improvement Clauses Act; enabled the sanitary authority to become the commissioners for establishing baths and washhouses, and to become the burial board; and gave them the same powers for laying water mains that they previously had for providing sewers. Where the earlier Act had not already been adopted, corporations and Improvement Commissioners were now authorised to adopt it by their own resolution, and in other places having a known and defined boundary it could be adopted by resolution of the owners and ratepayers. The sanction of the General Board of Health or Privy Council was no longer required, and the adoption of the Act was thus left to the free choice of the governing body, or, if there were none, of the ratepayers of the district. This Act was amended in 1861 (24 & 25 Vict. c. 61). By it every local authority invested with powers of town government and rating by any local Act was authorised to adopt any part of the Acts of 1848 and 1858, and various amendments in detail of the earlier Acts were provided. It was amended again in 1866 (29 & 30 Vict. c. 90). This latter Act increased the powers of districts with regard to the disposal of sewage, increased the powers of local authorities for dealing summarily with nuisances, and for dealing with infectious disease, and enabled them to provide mortuaries and hospitals. There was also a



further amendment in 1868 (31 & 32 Vict. c. 115), which extended the powers of sewer authorities as to providing and taking care of sanitary conveniences for houses.

In the year 1871 the Act (34 & 35 Vict. c. 70) was passed under which the Local Government Board was constituted. The existing powers of control and supervision of sanitary authorities, such as they were, which had previously been exercised by the Privy Council and the Home Secretary, were transferred to the new Board, and further powers were conferred on it.

*Act of 1872.*—In the next year important changes in the law affecting public health were effected (35 & 36 Vict. c. 79). Instead of leaving each district to adopt the Public Health Acts, or parts of them, as should seem good to its governing body or its ratepayers, England and Wales—outside the Metropolis—were divided into urban and rural sanitary districts, each under the jurisdiction of its own sanitary authority. Urban districts were defined to mean boroughs, existing Improvement Act districts, and local government districts constituted such at any time. Rural districts were poor law unions, or such parts of them as were not included in an urban district. The powers possessed by urban authorities were larger than those applicable to rural districts. The powers of the Local Government Act, 1858, and all the powers, etc., exercisable by or attaching to a local board under it as amended, to a sewer authority under the Sewage Utilisation Acts, to a nuisance authority under the Nuisances Removal Acts, and to a local authority under various other Acts, were conferred on an urban authority. The powers of a rural authority related chiefly to sewage and nuisances. The Local Government Board were empowered to constitute local authorities whose districts abutted on any port, port sanitary authorities, with special powers for looking after the sanitary well-being of the port. It was also empowered to unite districts, or parts of districts, where such a course should seem desirable, for the purpose of procuring a common supply of water, carrying into effect a system of sewerage, or for any other purposes of the Acts.

*Act of 1875.*—By this time it will be apparent that the mass of legislation, so often amended, had necessarily become cumbrous and difficult to understand or to work effectively. Parliament was consequently induced in 1875 to pass a comprehensive Act consolidating the law as it existed at that date, and providing a code which contained nearly all the statutory provisions applicable to the protection of the public health in England and Wales, outside the Metropolis. The Act of 1875 (38 & 39 Vict. c. 55) repealed no less than nineteen Acts which had previously been passed since the year 1848, and itself comprised three hundred and forty-three sections and five schedules, besides incorporating much of the Clauses Acts of 1847, referred to previously. It left the scheme of public health law in the same general form in which it had been settled in 1872, and though amended in various details since, the form still remains and seems likely to remain unaltered, though the constitution of the bodies who are charged with the administration of the law has been considerably changed since 1875, as will be seen subsequently.

*Sanitary Powers.*—It is recognised that the need of thickly populated districts for sanitary regulations is greater than that of purely agricultural regions, and larger powers are accordingly intrusted to urban than to rural authorities. The powers and duties given by the Act of 1875 to *all* sanitary authorities may be grouped under the following headings, viz.:—providing SEWERS and DRAINS (ss. 13–34); seeing that all houses in their district



have proper closet or PRIVY accommodation (ss. 35-41); the removal of REFUSE (ss. 42-45); requiring dwelling-houses to be properly cleansed where requisite (ss. 45-50); providing or seeing that there is provided a proper WATER SUPPLY for their district (ss. 50-70); regulation of cellar dwellings and LODGING HOUSES (ss. 71-90); discovery and removal of NUISANCES, including OFFENSIVE TRADES (ss. 91-115); discovery and seizure of UNSOUND FOOD intended for human consumption, *e.g.* rotten eggs, and see Public Health (London) Act, 1891, s. 47 (ss. 116-119); provision for dealing with infection (ss. 120-129); establishment of HOSPITALS (ss. 131-133); meeting EPIDEMICS (ss. 134-140); and provision of MORTUARIES (ss. 141-143). They also were given the powers belonging to any local authority under the BAKEHOUSE REGULATION ACT, since repealed by the Factory and Workshop Act, 1878 (41 Vict. c. 16), which gives them similar powers. In addition to the above matters intrusted to all sanitary authorities alike, further powers were given especially to *urban* authorities for providing ARTISANS' DWELLINGS, adopting the BATHS AND WASHHOUSES ACTS, the LABOURING CLASSES Lodging Houses Acts, cleansing STREETS and removing RUBBISH, removal of manure, OFFENSIVE TRADES, and maintenance of HIGHWAYS and STREETS, the erection of new buildings and laying out and construction of new STREETS, management of STREETS, lighting STREETS, providing public PLEASURE GROUNDS, MARKETS AND FAIRS, SLAUGHTER-HOUSES. They have powers under the Police Clauses Act, 1847, as since amended, with respect to obstructions and nuisances in STREETS, FIRES, places of public resort, hackney carriages and omnibuses, and public bathing; and as to licensing horses, vehicles, and pleasure boats. Districts nominally rural are sometimes populous, and may require urban powers. The Local Government Board can therefore by order declare that any provisions of the Act in force in urban districts shall be in force in a rural district or part of it, and may invest the rural authority with all or any of the powers, etc., of an urban authority (s. 276). They may also by general order direct that any of the provisions of the Public Health Act or any other Act relating to urban districts shall apply to rural districts (56 & 57 Vict. c. 73, s. 25).

There have since 1875 been several additions made to the sanitary powers of local authorities above enumerated. By Acts of 1877 and 1884 (40 & 41 Vict. c. 60, and 47 & 48 Vict. c. 75) CANAL *Boats* used as dwellings were brought under their supervision. Their powers, especially those of rural authorities, were much enlarged in the matter of WATER SUPPLY by an Act of 1878 (41 & 42 Vict. c. 25). In 1879 all local authorities were empowered to provide CEMETERIES for their districts (42 & 43 Vict. c. 31). In 1885 it was declared to be the *duty* of every sanitary authority to put their powers in force so as to secure the proper sanitary condition of all premises within the area under their control (48 & 49 Vict. c. 72, s. 7); and TENTS, VANS, SHEDS, and other similar structures in such a state as to be a nuisance or injurious to health were declared to be nuisances with which they might deal summarily (s. 9). In 1885 and 1886 Orders in Council were issued placing DAIRIES, cowsheds, and milkshops under their supervision and control. In 1889 provision was made for the notification of cases of INFECTIOUS DISEASES (52 & 53 Vict. c. 72), and next year further powers were given for dealing with such diseases (53 & 54 Vict. c. 34). This Act (s. 4) gives further powers for dealing with milk supplies which are suspected of being sources of infection.

In 1890 there was also a Public Health Amendment Act (53 & 54 Vict.



c. 59), by which enlarged powers are conferable on such local authorities as choose to adopt it. The subject-matters to which it relates are comprised among those already enumerated. Urban authorities may adopt all or any part of the Act, and rural authorities may adopt only certain specified sections, unless the Local Government Board thinks fit to invest them with further powers. Hitherto this Act has been by no means universally adopted. In 1892 a further amending Act (55 & 56 Vict. c. 57), also adoptive, was passed to enable urban authorities to deal with the expenses of making up private streets more effectively than they can under the provisions of the Act of 1875.

*Local Government Act.*—The Local Government Act, 1894 (56 & 57 Vict. c. 73), completely altered the constitution of the bodies intrusted with the administration of the laws affecting the public health, and the mode of their election; and gave further powers and duties to the new bodies it created, but left unaffected the powers previously intrusted to their predecessors. In the place of Improvement Commissioners, Boards of Health, and Boards of Guardians, whose members had been required to have a property qualification and who had been elected by means of voting papers given by voters possessing a voting power varying with the amount of their property, DISTRICT COUNCILS elected by ballot by all persons who possessed a rate-paying qualification were substituted. These councils, both urban and rural, were declared to be corporate bodies (s. 24, 7 b). The boundaries of many districts were also readjusted, so as to secure that a district should not, as previously had often happened, extend over portions of two or more counties. The existing powers of urban and rural sanitary authorities were transferred to urban and rural district councils respectively; and further miscellaneous powers were conferred, especially on rural district councils. The more important of these are that the control of HIGHWAYS was given to rural district councils, in the same way that it had previously been given to urban sanitary authorities. Certain powers previously exercised by justices, such as those with regard to the storage of petroleum (see EXPLOSIVES) and protection of INFANT LIFE, also enlarge their jurisdiction for the preservation of the public health and safety. Rural, but not urban, district councils are subject to the controlling powers of the County Council, similar to those exercised over all local authorities by the Local Government Board.

*Powers of Local Authorities.*—For the purpose of discharging the various functions imposed on them, district councils are clothed with large statutory powers. They may enter into any contracts necessary for carrying the Acts into execution (Act of 1875, s. 173). As both urban and rural district councils are now corporate bodies with a perpetual succession and a common seal, their contracts ought usually to be under seal, at anyrate unless they are for matters with regard to which their agents would have an implied authority to act in their name and on their behalf (see *Nicholson v. Bradfield Union*, 1865, L. R. 1 Q. B. 620). Urban authorities are specifically bound by sec. 174 to make every contract whereof the amount exceeds £50 in writing and under their common seal. And it has been repeatedly held that this direction is obligatory and must be enforced by the Courts; contracts not under seal are therefore liable to be set aside (*Young v. Leamington (Mayor of)*, 1883, 8 App. Cas. 517). In 1875 Boards of Guardians were the rural sanitary authorities, and their powers as to contracting were regulated by the POOR LAW. The Act of 1894 when creating rural district councils laid down no statutory regulations for this matter. It might be desirable that the Local Government Board should



extend sec. 174 of the 1875 Act to all rural district councils, so as to make the conditions under which contracts may properly be made clear to everyone. At present they are uncertain.

If local authorities have need to acquire land, they have a general power to purchase or take it on lease. They may also, with the consent of the Local Government Board, acquire it compulsorily, and for this purpose may put in force the compulsory sections of the LANDS CLAUSES ACTS (s. 176).

*Officers.*—District councils are required to appoint officers to carry on their work. They must have a MEDICAL OFFICER (or officers) OF HEALTH, and an inspector or inspectors of NUISANCES. Urban councils must also appoint a surveyor, a clerk, and a treasurer; and urban and rural councils alike must further appoint such assistants, collectors, and other officers and servants as may be necessary and proper for the efficient execution of the Acts. Officers and servants appointed or employed by a local authority may not be concerned or interested in any bargain or contract made with such authority—except, of course, their own contracts of service or in a contract for the sale, purchase, leasing, or hiring of any lands, rooms, or offices made with due formalities, or a contract as shareholders of a joint-stock company. The penalty for being concerned in a contract which does not come within one of the above exceptions is £50, recoverable with full costs of suit by action of debt; such action, however, now can only be brought with the sanction of the Attorney-General (47 & 48 Vict. c. 74, s. 2). The contract also is void so that the offending servant may not derive any benefit from it (*Melliss v. Shirley Board*, 1885, 16 Q. B. D. 446). Officers intrusted with the custody or control of money are required to give bonds for the faithful execution of their office or employment (s. 194); they are also required periodically to render accounts in writing of all moneys received by them, together with vouchers or receipts for payments, and should pay over to the treasurer moneys collected for rates within seven days of their receipt (s. 195). An officer who fails to render proper accounts, or to pay over moneys as and when required by the Act, or to deliver up his books or papers after written notice, may be committed to prison by a Court of summary jurisdiction (s. 196).

*Meetings and Committees.*—All district councils must hold an annual meeting, and other meetings at least once a month, or oftener, if necessary, for properly executing their powers and duties under the Acts (s. 199). They may further appoint committees, consisting wholly or in part of their own members, for the exercise of any powers which, in the opinion of the council, can properly be exercised by committees, and the council may authorise a committee to institute any proceedings or do any act which it might itself have instituted or done (Act of 1894, s. 56). A rural district council, or its committee properly authorised, may form a parochial committee for any contributory place, to act as its agents there for any specified purpose (Act of 1875, s. 202). A committee, once appointed, cannot delegate its powers to one or more of its members (*Cook v. Ward*, 1877, 2 C. P. D. 255). If the act it is to do is one which the corporation ought to execute under seal, the authorisation to the committee empowering it to act should be under seal likewise (*Oxford (Mayor of) v. Crow*, [1893] 3 Ch. 535). Where power is not delegated to a committee, approval of its report or of the minutes of its proceedings may amount to its adoption by the council (*Barnsley Board v. Sedgwick*, 1867, L. R. 2 Q. B. 185).

*Protection of Councils and Councillors.*—Local authorities and their members are protected from any action, liability, claim, or demand whatso-



ever in respect of any matter or thing done or contract entered into *bond fide* for the purpose of executing the Acts (Act of 1875, s. 265), even though the thing done is not authorised by them (*Bailey v. Cuckson*, 1858, 7 W. R. 16). If the Acts authorise the doing of the thing complained of, and it was done without negligence, no action lies. But an action may be maintained if it can be shown that the injury complained of might have been averted by a reasonable exercise of the powers which the public body possessed (*Geddis v. Proprietors of the Bann Reservoirs*, 1877, 3 App. Cas. 430). Where an action is not maintainable, the person injured is without remedy, unless the Act which authorises the injury gives him a right to compensation. Sanitary authorities are nearly always liable to compensate persons whose rights they injure, for the Act provides (s. 308) that "any person who sustains damage by reason of the exercise of any of its powers, in relation to any matter as to which he is not himself in default, shall be entitled to full compensation." Thus a man who successfully contended that meat belonging to him ought not to be condemned as unfit for human food, was held entitled to receive as compensation the amount he had expended on his successful defence (*In re Bater and Birkenhead*, [1893] 2 Q. B. 77). All disputes as to the fact of damage or the amount of compensation are to be settled by arbitration. The person claiming compensation can, if he chooses, proceed to arbitration, and have the fact of damage ascertained and the amount payable settled, even though the liability to pay anything is in dispute. The local authority may, however, afterwards dispute the award, and defend any action brought to enforce it (*Brierly Hill Board v. Pearsall*, 1884, 9 App. Cas. 595). If the compensation claimed does not exceed £20, it may be ascertained by and recovered before a Court of summary jurisdiction. Such Court would apparently be competent to decide the question of liability as well as of amount; but its decision would be open to appeal. Actions must also be commenced within six months (56 & 57 Vict. c. 61).

*By-laws.*—See also vol. ii. BY-LAWS. District councils are empowered under many sections of the Acts to make by-laws for giving effect to their statutory powers. If not for the purposes of the Acts, by-laws are of no effect (*Calder Navigation v. Pilling*, 1845, 14 Mee. & W. 76). Such by-laws must be under their common seal, and may impose penalties not exceeding £5 for each offence; and, in case of a continuing offence, a further penalty not exceeding £2 for each day it is continued after written notice of the offence (ss. 182, 183). By-laws, when made, must be confirmed by the Local Government Board before they are of any effect; and certain prescribed formalities must be observed before that Board will confirm them (s. 184). By-laws must be reasonable, otherwise the Courts hold them to be bad and ineffective (*Elwood v. Bullock*, 1844, 6 Q. B. 383). If made without statutory sanction, or bad for any other reason, the approval of the Board gives them no validity (*R. v. Wood*, 1855, 5 El. & Bl. 57). If regularly made, a by-law has within the district to which it applies the same force as an Act of Parliament (*Hopkins v. Swansea (Mayor of)*, 1841, 8 Mee. & W. 901). When by-laws have been duly made, a district council cannot properly dispense with compliance with them, as they are presumably made in the public interest (*In re McIntosh and Pontypridd Improvement Co.*, 1891, 8 T. L. R. 128).

*Legal Proceedings.*—In order to punish offences under the various provisions of the Acts, or recover penalties, forfeitures, or costs not otherwise provided for, local authorities may proceed before a Court of summary jurisdiction (s. 251); and it is expressly provided (s. 258) that no justice of



the peace shall be deemed incapable of acting by reason merely of being a member of a local authority or a ratepayer of the district from which the case comes. A justice, however, who has a substantial interest in the result of the hearing, so as to make it probable that he has a real bias, would be disqualified (*R. v. Handsley*, 1881, 8 Q. B. D. 383). If the demand is for a sum below £50, which the local authority is empowered to recover in a summary manner, they may, if they prefer it, proceed in the County Court (s. 261). Proceedings must in either case be instituted within six months from the time when the matter of complaint or information arose (*Eddleston v. Francis*, 1860, 7 C. B. N. S. 586; *Tottenham Board v. Rowell*, 1876, 1 Ex. D. 512). A local authority may appear in any proceeding by their clerk, or by any officer or member authorised generally, or, in respect of any special proceeding, by resolution of such authority (s. 259). But they cannot appear by a person who is not a member or officer of theirs; such as a policeman (*Kyle v. Barber*, 1888, 58 L. T. 229). It is necessary in any proceedings to be prepared to prove that authority to institute them was in fact given (*Anderson v. Hamlin*, 1890, 25 Q. B. D. 221). Proceedings for the recovery of any penalty under the Act may only, as a rule, be instituted by a party aggrieved, or by the local authority of the district in which the offence was committed. Any other person must first obtain the written consent of the Attorney-General (s. 253). In ordinary cases where a penalty is imposed, half goes to the informer and the remainder to the local authority; but where they lay the information, the whole goes to them, and is carried to the fund applicable to the general purposes of the Act (s. 254). There is an absolute right of appeal to Quarter Sessions given to any person who deems himself aggrieved by any order, conviction, judgment, or determination of—or by any matter or thing done by a Court of SUMMARY JURISDICTION (s. 269), the conditions of appeal being now those prescribed by the Summary Jurisdiction Act, 1879.

*Rating Powers.*—The execution of the various powers and duties imposed on local authorities by the Public Health Acts necessarily entails expense. For the purpose of raising money to defray such expenses, urban authorities may levy a special rate called a general district rate (Act of 1875, s. 207), and rural authorities may issue precepts to the overseers of each contributory place within their district requiring them to raise their proper quota out of the poor rate (s. 230). There are several differences in the incidence of the rates in urban and rural districts, and it will be convenient to discuss them separately.

*Urban District Rates.*—In many urban districts, rates for some of the purposes contemplated by the Public Health Acts were, before 1875, leviable under private Acts, or the expenses were chargeable on the borough fund; in such cases the powers previously existing remain unaffected. Where a general district rate is made, it is to be levied on the occupier of all kinds of property assessable to any rate for the relief of the poor, according to the valuation list for the time being in force. But, inasmuch as the expenditure under the Acts is for the benefit of people rather than of property, certain kinds of rateable property, which are not occupied for habitation, and derive comparatively little benefit from urban expenditure, are to be assessed at only one-fourth of their net annual rateable value. The properties so exempted are—(1) tithes or tithe rent-charges; (2) arable, meadow, or pasture land; (3) woodlands, market gardens, or nursery grounds; (4) land covered with water, including canals and their towing-paths; (5) railways constructed under parliamentary powers (s. 211); (6) allotments (54 & 55 Vict. c. 33, s. 2). Mines seem to have been overlooked,



and are not excepted, and therefore are rateable at their full value (*Thursby v. Briercliffe Churchwardens*, [1895] App. Cas. 32). The urban authority may, if they choose, levy the rate on the owners instead of on the occupiers of small tenements under £10 rateable value, or of tenements let in separate apartments, or where the rents become payable or are collected at any period less than quarterly; but if they do, they must assess the owners at a reduced amount (see *R. v. Barclay*, 1882, 8 Q. B. D. 486). General district rates need not be levied over the whole of an urban district. In many cases expenditure is for the benefit wholly or in large measure of some particular portions, and it would be a hardship on the ratepayers elsewhere to have to contribute. The urban authority have a discretionary power to divide their district, or any street therein, into parts, and to make a separate assessment on any such part for all or any of the purposes of the Acts. They need not divide their district by metes and bounds, but can do it by naming a particular class of property, such as woodlands, and thus apparently could give a further exemption to such property from any rate beyond the general limitation to one-fourth already mentioned (*R. v. L. B. & S. C. R.*, 1879, 5 Q. B. D. 89); but if they do not make such a division, portions of their district which apparently derive no benefit cannot escape payment of the full rate. The urban authority, and not the ratepayers, are the persons to decide if and how exemption is to be granted in this way (*Dorling v. Epsom Board*, 1855, 5 El. & Bl. 571).

*Rural Expenses.*—The expenses of a rural authority are divisible into general expenses incurred for the benefit of the district generally, and special expenses incurred on behalf of some contributory place or places. The latter are defined to be the expenses of maintaining and cleansing sewers, providing a water supply, expenses incidental to the possession of property transferred to the rural authority in trust for any contributory place, and any other expenses incurred or payable by the authority in or in respect of such place, which the Local Government Board may determine to be special expenses. General expenses are payable out of the common fund raised out of the poor rate, in proportion to the rateable value of the several contributory places in the district. Special expenses are a separate charge on each place; but where any work is for the common benefit of two or more places, the rural authority may apportion the expense between such places as they think just (s. 229). Rates may be recovered summarily if not paid within fourteen days after demand (s. 256).

Local authorities, both urban and rural, may, with the sanction of the Local Government Board, borrow money for the purpose of defraying any costs and expenses incurred by them in the execution of the Public Health Acts (s. 233). Money may, however, only be borrowed for permanent works, after a local inquiry has been held. The amount which may be borrowed must not exceed two years' rateable value of the district, and must be paid off by instalments within the prescribed period, which may in no case exceed sixty years, and is generally shorter. The money is usually borrowed on debenture stock, created under the Local Loans Act, 1875 (38 & 39 Vict. c. 83).

Besides these general provisions for raising rates from their district, or from a particular part of it, local authorities are further empowered, in cases where they incur expenses on account of an individual, to recover the amount so expended from him, or from the owner of the property, if the expenses were incurred for works of private improvement. They must serve a written demand for payment of the sum due (*R. v. Local Government Board*, 1882, 10 Q. B. D. 324), and, if it is not complied with, may



then recover it summarily before justices (s. 251); or, in cases where the owner is liable, may either recover it with 5 per cent. interest from the person who was owner at the time when the works were completed—the amount remaining a first charge on the premises till payment—or may declare that the expenses are to be payable by instalments over a period not exceeding thirty years (s. 257). If the sum claimed does not exceed £50, the local authority may recover it in a County Court instead of before justices.

*Metropolis.*—The Public Health Act, 1875, did not extend to the metropolitan area, except in one or two comparatively unimportant matters. London continued to be regulated in sanitary matters by a variety of statutes, commencing in the year 1817 (57 Geo. III. c. xxix., commonly known as Michael Angelo Taylor's Act, for regulating paving). The more important of these were the Metropolis Management Acts, 1855 (18 & 19 Vict. c. 120) and 1862 (25 & 26 Vict. c. 102), and the Nuisances Removal Acts and the Sanitary Acts mentioned *supra*. There were also several other Acts dealing with such matters as police (2 & 3 Vict. c. 47), smoke nuisances (16 & 17 Vict. c. 128; 19 & 20 Vict. c. 107), slaughter-houses (37 & 38 Vict. c. 67), etc. The provisions of the various statutes nominally affecting health were at length codified in the year 1891 (54 & 55 Vict. c. 76), but other Acts, such as Michael Angelo Taylor's and large portions of the Metropolis Management Acts, still remain. The Act of 1891 contains the provisions now applicable with reference to the following matters, viz.:—NUISANCES (ss. 2–18), OFFENSIVE TRADES (ss. 19–22), SMOKE (ss. 23, 24), workshops and BAKEHOUSES (ss. 25, 26), DAIRIES (s. 28), removal of REFUSE (ss. 29–36), PRIVY, closets, etc. (ss. 37–46), FOOD (s. 47) (the words used are more comprehensive and the penalties heavier than under the 1875 Act), WATER (ss. 48–54), INFECTIOUS DISEASE (ss. 55–74), HOSPITALS, etc. (ss. 75–81), EPIDEMIC DISEASE (ss. 82–87), MORTUARIES (ss. 88–93), LODGINGS (s. 94), TENTS, VANS, AND SHEDS (s. 95), and underground rooms (ss. 96–98). The powers given are, with verbal alterations, much the same as those given by the general Acts. Any important differences are noticed under their different titles.

The authorities for the execution of the Act, termed by it sanitary authorities, are—(1) the Commissioners of Sewers for the city of London, whose powers and duties have now been transferred to the corporation of the City (60 & 61 Vict. c. cxxxiii.); (2) the vestries of the larger parishes, including the local board of Woolwich; (3) the district boards of certain groups of smaller parishes; and (4) the Boards of GUARDIANS of certain excepted localities, such, for instance, as the various INNS OF COURT. These governing bodies were called into existence by the Metropolis Management Act, 1855. Their constitution and the mode of their election was modified by the Local Government Act, 1894 (55 & 56 Vict. c. 73, s. 31), but their functions still remain unaltered. In certain cases where a sanitary authority requires structural alterations to premises, any person who thinks himself aggrieved is empowered to appeal to the County Council, who also have powers of proceeding themselves in cases of default by a sanitary authority. The city of London is, however, exempt from this control (s. 133).

Such parts of the Metropolis Management Acts, as did not deal with the matters specified under the various headings above set forth, were left unrepealed in 1891 and are still in force. Important matters, affecting public health, such as the regulation of STREETS, and the construction of SEWERS and DRAINS, are still regulated by those and other Acts. Build-



ings were the subject of separate legislation in the year 1894 (57 & 58 Vict. c. ccxiii., an important Act of 218 sections, which repealed the whole or large portions of fourteen other Acts, most of them public, but itself was passed through Parliament with comparatively little notice as a private Act).

*Ireland.*—The earliest public health legislation for Ireland was in the year 1851, when a Common Lodging Houses Act was passed, and in 1854 there was a Towns Improvement Act. The Diseases Prevention Act, 1855, the Nuisances Removal Acts, and the Sanitary Acts also applied to Ireland. In 1878 there was a general Public Health Act, similar to that passed for England in 1875, repealing the earlier Acts and codifying the law as it then existed (41 & 42 Vict. c. 52). It has been several times since amended in minor points; but the Act of 1878 still remains the code by which matters affecting health are mainly regulated.

*Scotland.*—There is also separate legislation on the subject of public health for Scotland. The principal Acts now in force are 30 & 31 Vict. c. 101; 52 & 53 Vict. c. 50; and 57 & 58 Vict. c. 58.

[*Authorities.*—Vesey FitzGerald's *Public Health Acts*, 7th ed., 1895; Glen's *Public Health Acts*, 11th ed., 1895; Lumley's *Public Health Acts*, 5th ed., 1895. *For London*: Roberts and Gollan's *Public Health London Act*, 1891; Hunt's *Law relating to London Local Government*, 1897.]

**Public Highway.**—See HIGHWAYS.

**Public-House.**—A public-house in ordinary acceptation is a house where intoxicating liquors are sold by retail and consumed. For the purpose of the sale of intoxicating liquor a justice's licence and an excise licence are necessary. The law relating to the subject is set out in the article on LICENSING in vol. vii. p. 385.

The rateable value of a public-house is estimated by reference to its locality, its goodwill, and the licence which belongs to it. According to the rule prescribed by the Parochial Assessments Act, 1836, s. 1, the rate must be made "upon an estimate of . . . the rent at which the same (*i.e.* the rated hereditaments) might reasonably be expected to let from year to year, free of all usual tenant's rates and taxes, and tithe commutation rent-charge (if any), and deducting therefrom the probable average actual cost of the repair, insurance, or expenses, if any, necessary to maintain them in a state to command such rent" (see *Allison v. Monkwearmouth Shore Overseers*, 1854, 4 El. & Bl. 13; 23 L. J. M. C. 177; *Sunderland Overseers v. Sunderland Union*, 1865, 18 C. B. N. S. 531; 34 L. J. M. C. 121). In the case of a tied house, the rateable value should be ascertained irrespective of the tie (*ibid.*; *White v. Bradford Union*, 1898, 62 J. P. 337). In the absence of special circumstances, in order to arrive at the rateable value of an ordinary public-house, evidence of the average weekly takings is not admissible (*Dodds v. South Shields Union Assessment Commissioners*, [1895] 2 Q. B. 133; 64 L. J. M. C. 509; 59 J. P. 452; doubting *Clark v. Assessment Commissioners of Alderbury Union*, 1880, 6 Q. B. D. 139). As to rating the person in occupation of licensed premises, see *R. v. Morrish*, 1863, 32 L. J. M. C. 245.

Under the Payment of Wages in Public-Houses Prohibition Act, 1883 (46 & 47 Vict. c. 31), it is illegal to pay wages to any workman at or within any public-house, except such wages as are paid by the resident owner or



occupier of such public-house to any workman *bonâ fide* employed by him. Penalty not exceeding £10. Similar provisions are contained in the Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), and the Metalliferous Mines Act, 1872 (35 & 36 Vict. c. 77).

It is illegal to take the poll at an election for a member of Parliament in a public-house (16 & 17 Vict. c. 68, s. 6), or to use the house as a committee room at a parliamentary or municipal election (46 & 47 Vict. c. 51, s. 20; 47 & 48 Vict. c. 70, s. 16), or to hold a parish meeting, or meeting of a parish council, or of a district council, or of a board of guardians, except in cases where no suitable room is available for such meeting, either free of charge or at a reasonable cost (56 & 57 Vict. c. 73, s. 61), or for borough justices to use a room in a public-house to transact their business (45 & 46 Vict. c. 50, s. 160). As to bribery or treating on licensed premises, see 46 & 47 Vict. c. 51, s. 38, 47 & 48 Vict. c. 70, ss. 23, 36).

Where any officer arrests or has in custody any person by virtue of any action, writ, or attachment for debt, such officer shall not convey such person without his free consent to any house licensed for the sale of intoxicating liquors, etc., nor charge such person with any sum for, or procure him to call or pay for, any liquor, food, or thing whatsoever, except what he freely asks for (50 & 51 Vict. c. 55, s. 14).

It is an offence under the Public Health Acts for any person to knowingly let for hire any house, room, or part of a house in which any person has been suffering from any dangerous infectious disorder, without having such house, room, or part of a house, and all articles therein liable to retain infection, disinfected to the satisfaction of a legally qualified medical practitioner, and for this purpose "the keeper of an inn shall be deemed to let for hire part of a house to any person admitted as a guest into such inn" (38 & 39 Vict. c. 55, s. 128; 54 & 55 Vict. c. 76, s. 63).

See, further, LICENSING.

**Publici juris**—Of public right. All property held for the benefit of the people generally, and of which they are entitled to the common enjoyment, is said to be of public right. Such are navigable rivers, the seashore, etc., held by the Crown for the public benefit. All other rights of a similar kind are *publici juris*.

**Public Improvements.**—The Public Improvement Act, 1860 (23 & 24 Vict. c. 30), is an Act to enable a majority of two-thirds of the rate-payers of any parish or district duly assembled to rate their district in aid of public improvements for general benefit within their district, but such rate shall not exceed sixpence in the pound.

**Public International Law.**—See INTERNATIONAL LAW.

**Public Law.**—See INTRODUCTION, vol. i.; JURISPRUDENCE.

**Public Libraries.**—See BRITISH MUSEUM; LIBRARIES.



**Public Loans.**—The various Acts passed relating to loans by the Government of this country to other countries will be found under “Public Loans and Guarantee” in the Index of Statutes. See also PUBLIC WORKS LOANS.

**Public Meeting.**—A public meeting is an assembly of persons called together by private persons convening the same for the discussion of any question, to which they wish to call public attention. It may be either held on premises temporarily or permanently in the possession of the conveners or some of them, or in an open space as Hyde Park, or even in the public street.

In the first case, those present are only there by virtue of a licence revocable at any time, and may be required to leave by the conveners, and in case of refusal may be removed. As to this right of expulsion the reader is referred to the article on EXPULSION, vol. v. at p. 251. If such a meeting is held in the streets, and an obstruction is caused, those forming it may be proceeded against for obstructing the highway.

Persons addressing public meetings have no privilege to relieve them from the legal consequences of any slander they may utter.

Public meetings are usually controlled by a chairman, who may be appointed by the conveners, or with their consent elected by the meeting.

During the session of Parliament it is illegal to hold public meetings to petition the Crown or Parliament in the open air within one mile of Westminster Hall; this is to prevent attempts to intimidate or coerce either of the Houses of Parliament (57 Geo. III. c. 19, s. 23).

For information as to other classes of meetings, such as meetings of shareholders in companies, of creditors of bankrupts, and of statutory bodies, the reader is referred to the articles dealing with companies, bankrupts, and the several bodies in question.

**Public Notice.**—The *London Gazette* is, at common law, evidence of various acts of State. By the Documentary Evidence Act, 1868, the Gazette is *prima facie* evidence of any proclamation, order, or regulation issued by Her Majesty, or by the Privy Council, or by any of the principal departments of the Government. In some cases the Gazette is by statute made conclusive evidence, the most important of which are as follows:—(1) Respecting Bank Notes (7 & 8 Vict. c. 32, s. 15, and 8 & 9 Vict. c. 37, s. 10); (2) Bankruptcy Proceedings (Bankruptcy Act, 1883); (3) The City of London Parochial Charities Act, 1883 (46 & 47 Vict. c. 36, s. 36); (4) The Extradition Act, 1870 (33 & 34 Vict. c. 52, s. 5); (5) The County Boundaries (Ireland) Act, 1872 (35 & 36 Vict. c. 48, s. 3); (6) The General Prisons (Ireland) Act, 1877 (40 & 41 Vict. c. 49, s. 57); (7) The Lands Drainage (Ireland) Acts of 1842, 1846, and 1847; (8) The Peace Preservation Acts for Ireland (19 & 20 Vict. c. 36; 28 & 29 Vict. c. 118; 38 Vict. c. 14). See GAZETTES, vol. vi. p. 59.

**Public Nuisance.**—See NUISANCE.

**Public Officer.**—See PUBLIC AGENT.



**Public Order** (*ordre public*)—A term used on the Continent to express the higher necessity which places a public before a private interest. *Salus populi suprema lex.*

**Public Parks.**—See 22 Vict. c. 27, and 51 & 52 Vict. c. 42, amended by 54 & 55 Vict. c. 73. See PLEASURE GROUNDS.

**Public Performance.**—This term is used—(1) with reference to the licensing of stage plays (*R. v. Strugnell*, 1866, L. R. 1 Q. B. 93; *Shelley v. Bethell*, 1883, 12 Q. B. D. 11; see THEATRE); and (2) with reference to the acquisition or infringement of dramatic copyright (3 & 4 Will. IV. c. 15, ss. 1, 2; 5 & 6 Vict. c. 45, s. 20; see *Duck v. Bates*, 1883, 13 Q. B. D. 843; see COPYRIGHT). It is also used with reference to the matters above dealt with under PUBLIC ENTERTAINMENTS.

**Public Place.**—See PLACE.

**Public Policy.**—The English Courts refuse to enforce agreements which have all the other requisites of a valid and binding contract, if their object is to do that which it is the policy of the law to prevent, in the same way that they refuse to enforce a contract to do something which is illegal or which is *contra bonos mores*. It is very difficult to specify exactly what is contrary to public policy. Mr. Justice Burrough, in *Richardson v. Mellish*, 1831, 2 Bing. 229, said: “Public policy is a very unruly horse, and when once you get astride it you never know where it will carry you”; and as early as 1711, Chief-Justice Parker, in the case of *Mitchel v. Reynolds*, 1 P. Wms. 181, speaks of its “being difficult to reconcile the jarring elements.” Sir George Jessel points out, in the case of *Printing and Numerical Registering Co. v. Sampson*, 1875, L. R. 19 Eq. at p. 465, that “it must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred and shall be enforced by Courts of justice. Therefore you have this paramount public policy to consider, that you are not lightly to interfere with freedom of contract.” The following passage from the judgment in *Holman v. Johnson*, 1775, Cowp. 343, is worth noting: “The objection that a contract is immoral or illegal as between plaintiff and defendant sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed, but it is founded on general principles of policy which the defendant has the advantage of, contrary to the real justice as between the plaintiff and himself, by accident, if I may so say. The principle of public policy is this—*ex dolo malo non oritur actio*.” No Court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If from the plaintiff's own showing, or otherwise, the cause of action appears to arise *ex turpi causâ*, or the transgression of a positive law of the country, there the Court says he has no right to be assisted (*Scott v. Brown*, [1892] 2 Q. B. 724). It is upon that ground that the Court go, not for the sake of the



defendant, but because they will not lend their aid to such a plaintiff. Some transactions, which at first sight appear contrary to public policy, when looked at from another point of view are really highly beneficial to the public, *e.g.* a contract in restraint of trade by depriving the person restrained of the right to exercise his skill for the benefit of his fellow-creatures may be regarded as inflicting an injury on the trade of the country. On the other hand, Best, C.J., in *Homer v. Ashford*, 1825, 3 Bing. 326; 28 R. R. 634, speaking of such contracts, says that their effect is to encourage rather than cramp the employment of capital in trade and the promotion of industry. A similar instance is to be found in the rule which says that it is contrary to public policy for the Crown to bind itself to employ those in its military service for a definite time (*De Dohse v. R.*, 1886, H. L. unreported), a rule which it has been suggested extends to persons in the civil as well as the military employment of the Crown (*Dunn v. R.*, [1896] 1 Q. B. 116). On the other hand, it might well be urged that the public would benefit by certain civil servants not being liable to be dismissed at the pleasure of the Crown (see *Gould v. Stuart*, [1896] App. Cas. 575). It might be said that in the case of military service discipline must be paramount, but that in the case of persons in administrative positions independence is the object to be aimed at. Parliament has recognised this fact in the case of judicial appointments by providing that the judges of the High Court shall hold office *quamdiu se bene gesserint*; and we have only to look at our own legal history previous to the Act of Settlement, or indeed at the contemporary history of other States, to see that this restriction on the Crown is certainly not contrary to public policy.

Public policy does not admit of definition, and is not easily explained; it is a variable quantity, which must vary, and does vary, with the habits, capacities, and opportunities of the public (per Kekewich, J., *Davies v. Davies*, 1887, 36 Ch. D. at p. 364); but there are certain classes of contracts which have been dealt with by the Courts. Sir William Anson enumerates these classes as follows:—(1) Agreements tending to injure the public service; (2) agreements which injure the State in its relation with other States; (3) agreements which tend to pervert the course of justice; (4) agreements which tend to abuse of legal process; (5) agreements which affect the freedom or security of marriage; (6) agreements in restraints of trade; and (7) agreements which are *contra bonos mores*. Some of these have already been incidentally referred to—(1) The Courts have always held, on grounds of public policy, that an officer appointed by the Government, treating as an agent for the public, is not liable to be sued upon contracts made by him in that capacity (*Macbeath v. Haldimand*, 1786, 1 T. R. p. 172; 1 R. R. 177); and the reason given is that if such persons were to be held personally responsible under such circumstances, no man would accept of any office of trust under Government upon such conditions. The rule was approved by Dallas, C.J., in the case of *Gidley v. Lord Palmerston*, 1822, 1 St. Tri. N. S. 1263; 24 R. R. 668, and has been followed by the Court of Appeal in the recent case of *Dunn v. MacDonald*, [1897] 1 Q. B. 401 (and see *Raleigh v. Goschen*, [1898] 1 Ch. 73). Another instance of an agreement tending to injure the public service is to be found in contracts for the sale of public offices, or the assignment of salaries and pensions. Lord Kenyon, in the case of *Blackford v. Preston*, 1799, 8 T. R. 89, said: "There is no rule better established respecting the disposition of every office in which the public are concerned than this *detur digniori*. On principles of public policy no money consideration ought to influence the



appointment to such offices"; and he throws out the suggestion that the statute of 5 & 6 Edw. VI., which prohibited the sale of certain offices, was probably quite unnecessary. The rule that salaries and pensions are not assignable is probably best put by Parke, B., in *Wells v. Foster*, 1841, 8 Mee. & W., who points out that where a pension is given entirely as compensation for past services, it is always assignable; but if it partakes at all of the nature of a retaining fee for possible future services, as in the case of the half-pay of an officer, then it is against the policy of the law that it should be assignable. (2) Contracts with an alien enemy, or contracts hostile to a friendly State, are both considered to be contracts which it is against the policy of the law to enforce, the first, because they tend to injure our own country directly; the latter, because they do the same thing indirectly by embroiling us with foreign Powers. Instances of these two classes of cases are to be found in *Esposito v. Bowden*, 1857, 7 El. & Bl. p. 793, and in *De Wütz v. Hendricks*, 1824, 2 Bing. 314; 27 R. R. 600, where Best, C.J., points out that it is contrary to the law of nations (which in all cases of international law is adopted into the municipal code of every civilised country) for persons in England to enter into engagements to raise money to support the subjects of a Government in amity with our own in hostilities against their Government. (3) Any agreement which tends to pervert the course of justice, such as an agreement to put an end to a prosecution otherwise than by the ordinary course of law, is not enforceable, even if the agreement contains a stipulation that the object of the prosecution (*e.g.* the repair of a highway) is to be carried into effect before the prosecution is to be withdrawn (*Windhill Local Board of Health v. Vint*, 1890, 45 Ch. D. p. 351), though, of course, in all offences which involve damages to an injured party, for which he may maintain an action, it is competent, notwithstanding that they are also of a public nature, to compromise or settle his private damage in any way he may think fit. Questions have sometimes arisen with regard to agreements to refer matters in dispute to arbitration (see the article on ARBITRATION, under the heading *References by Consent Out of Court*). (4) The Courts will not enforce agreements which tend to encourage either maintenance or champerty. The cases on bargains void for champerty have been fully dealt with by the writer of the article on CHAMPERTY. (5) Agreements in restraint of marriage are unenforceable. In *Lowe v. Peers*, 1768, 4 Burr. 2225, the defendant promised, under a penalty of £1000, not to marry anyone except the plaintiff; it was pointed out in the course of the argument that this was not an agreement not to marry at all; but the Court took the view that the agreement restrained the defendant from marrying at all in case the plaintiff would not permit him to marry her at all. If the agreement is not to marry within a limited time, the agreement is *prima facie* contrary to public policy; but if there are circumstances showing that the restraint was prudent and proper in the particular instance, this presumption may be rebutted (*Hartley v. Rice*, 1808, 10 East, 22; 10 R. R. 228). A covenant in restraint of a second marriage does not appear to be contrary to public policy (*Baker et Ux. v. White et Al.*, 1690, 2 Vern. 215). (6) The cases on contracts in restraint of trade are exceedingly numerous, and are dealt with fully in the article RESTRAINT OF TRADE. They are discussed at length in the recent cases of *Rousillon v. Rousillon*, 1880, 14 Ch. D. 351; *Davies v. Davies*, 1887, 36 Ch. D. 359; and *Nordenfelt v. Maxim Nordenfelt & Co.*, [1894] App. Cas. 535. The old rule was that laid down by Chief-Justice Tindal in *Horner v. Graves*, 1831, 7 Bing. 735; 33 R. R. 635. Contracts in restraint of trade are in themselves (if nothing shows them to be reasonable) bad in the eyes of the law; and



he cites, as instances of such agreements, *Pragnell v. Close*, 1673, Aleyn, 67; *The Case of the Ten Tailors of Exeter v. Clarke*, 1685, 2 Show. 350; *Claygate v. Batchelor*, 1598, Ow. 143; *Year Book*, 2 Hen. v. fo. 5. In time it came to be considered that a restraint which was unlimited in respect of time might be held to be reasonable (*Hitchcock v. Coker*, 1837, 6 Ad. & E. p. 438); but that one which was unlimited in respect of space was merely oppressive, and could not confer any benefit on the plaintiff (*Mitchel v. Reynolds*, 1711, 1 P. Wms. 181). A third stage has now been reached, and a covenant restricted, indeed, in respect of time, but wholly unrestricted as to space, has been held, having regard to the nature of the business and the limited number of the customers (namely, the Governments of this and other countries), not to be wider than was necessary for the protection of the company, nor injurious to the public interests of the country (*Nordenfelt case, supra*). It remains to be seen whether the last step will be taken, and the same test applied to covenants unrestricted both as to space and to time, namely, whether the restraint is wider than is necessary for the protection of the plaintiff. (7) Contracts *contra bonos mores* stand on a somewhat different footing to any of the above classes. In most cases they are founded on an immoral consideration, and so may be said to lack one of the essentials of a valid agreement. The older authorities are collected in the note to *Benyon v. Nettlefold*, 1850, 3 Mac. & G. 94, at 100, and are summarised by Lord Selborne in *Ayerst v. Jenkins*, 1873, L. R. 16 Eq. at p. 282.

**Public Prosecutor.**—See DIRECTOR OF PUBLIC PROSECUTIONS.

**Public Purposes.**—It was held in *Ellis v. Selby* (1835, 4 L. J. Ch. 69) that a bequest in a will “for charitable or other purposes, as my trustees shall think fit,” was void for uncertainty; but in *Dolan v. M'Dermot* (1867, L. R. 5 Eq. 60) a bequest for “such charities and other public purposes as lawfully might be in the parish of T.” was held to be a good charitable gift. It was held that the words “other public purposes” meant purposes *ejusdem generis*, i.e. charitable, and that they were used only as filling up a description of purposes which, although charitable within the Statute of Elizabeth (and in that sense included in “charities”), were not within the popular meaning of the word “charities” (Jarm., 5th ed., 174).

In *Liskeard Union v. Liskeard Water Works* (1881, 7 Q. B. D. 505) it was held (per Lord Coleridge, C.J., Pollock, B., and Manisty, J.) that a workhouse was a house of which the guardians were owners, and the company were bound to supply them with water for domestic purposes, such supply not being a supply for “public purposes” within the meaning of the special Act or of the Waterworks Clauses Act, 1847, and that for the purposes of the special Act the inmates of the workhouse were to be treated as one family, and the rate assessed accordingly. With regard to negligence of commissioners for a “public purpose,” see *Coe v. Wise*, 1866, L. R. 1 Q. B. 711. See also *Nitro-Phosphate and Odam's Chemical Manure Co. v. London and St. Katherine's Docks Co.*, 1878, 9 Ch. D. 503; *Gilbert v. Corporation of Trinity House*, 1886, 17 Q. B. D. 795.

**Public Records and Documents.**—The term “public documents” is used in two senses. In the first sense, it has reference



to the mode of proving the document; in the second, to what the document proves. In the first sense it includes all documents which are of such a public nature that production of the original is excused, and proof by copies is admitted. In this sense, wills deposited in Somerset House, and pleadings and affidavits filed in the High Court, are public documents.

In the second sense, public documents are those documents which are evidence generally, and not merely as against the parties thereto, of the facts stated therein. Thus a register of marriages is good evidence of the fact and date of marriages registered therein. Most documents which are public in this sense are public in the first sense also. But the converse is by no means true.

(1) *Documents Public as regards Mode of Proof*.—These documents include local and personal private Acts of Parliament, acts of State, treaties, royal proclamations, orders and regulations of the Government Departments, the general records of the realm in the custody of the Master of the Rolls, records of Courts of justice, registers of births, deaths, and marriages, and other official registers, wills, and a vast number of other documents under special Acts of Parliament.

The following are the general provisions with regard to the proof of such documents:—

*Private Acts of Parliament* (not public Acts), the *journals* of either House of Parliament, and *royal proclamations* may be proved by copies purporting to be printed by the Queen's printers, or under the superintendence or authority of Her Majesty's Stationery Office, and journals and proclamations, also by copies purporting to be printed by the printers to either House of Parliament (8 & 9 Vict. c. 113, s. 3; 45 & 46 Vict. c. 9, s. 2). Public Acts of Parliament require no proof, as the Courts take judicial notice of their contents.

*Proclamations, treaties, and other acts of State of any foreign State or any British colony*, and all judgments, decrees, orders, and other judicial proceedings of any Court of justice in any foreign State or in any British colony, and all affidavits, pleadings, and other legal documents filed or deposited in any such Court, may be proved by copies purporting to be certified or authenticated as in the section described (14 & 15 Vict. c. 99, s. 7).

*Proclamations, orders, or regulations* issued by Her Majesty or by the *Privy Council*, and proclamations, orders, or regulations issued by the authority of the Treasury, the Admiralty, Secretaries of State, the Board of Trade, the (late) Poor Law Board, the Local Government Board, the Education Department, and the Postmaster-General, may be proved—

(a) by a copy of the *Gazette* purporting to contain such proclamation, order, or regulation;

(b) by a copy purporting to be printed by the Government printer or Queen's printer, or under the superintendence or authority of Her Majesty's Stationery Office;

(c) by certified copy, certified by an officer of the department concerned as in the Act specified (31 & 32 Vict. c. 37; 45 & 46 Vict. c. 9, ss. 2 and 4; 34 & 35 Vict. c. 70, s. 5; 33 & 34 Vict. c. 75, s. 83; 33 & 34 Vict. c. 79, s. 21; 48 & 49 Vict. c. 36, s. 6; 49 Vict. c. 5).

*Registers of British vessels* may be proved by examined copy (*i.e.* a copy sworn to by a person who has examined it with the original), or by a copy certified by the person having charge of the original (14 & 15 Vict. c. 99, s. 12).

*The record of a conviction or acquittal*, by a copy certified under the hand



of the Clerk of the Court, or his deputy, having custody of the record (*ibid.* s. 13).

*By-laws* are generally proveable by copies authenticated by the seal of the Corporation making them. The special provisions with regard to the proof of various by-laws will be found in the Acts authorising them (see, *e.g.*, as to by-laws of municipal corporations, 45 & 46 Vict. c. 50, s. 24; and as to companies under the Companies Clauses Consolidation Act, 8 & 9 Vict. c. 16, ss. 124, 127). As to by-laws of railway companies, see *Motteram v. Eastern Counties Rwy. Co.*, 1859, 7 C. B. N. S. 59.

*Bankers' Books*.—Entries in bankers' books may be proved by examined copy (42 & 43 Vict. c. 11). This provision applies to all bankers who have duly made a return to the Commissioners of Inland Revenue, and to certified savings banks and post office savings banks (*ibid.* s. 9). It must be proved that the book was at the time one of the ordinary books of the bank, and that the entry was made in the usual and ordinary course of business, and that the book is in the custody or control of the bank (*ibid.* s. 4). The copy must be verified as a true copy, either by oral evidence or by affidavit (*ibid.* s. 5). The Court may order inspection of the books (*ibid.* s. 7, and *Howard v. Beale*, 1890, 23 Q. B. D. 1; *Parnell v. Wood*, [1892] Prob. 137).

*General Records of the Realm* in the custody of the Master of the Rolls may be proved by copy purporting to be certified by the deputy keeper of the records (1 & 2 Vict. c. 94, s. 12; as to inspection of these records, see Taylor on *Evidence*, ss. 1480–1485).

*Records of the High Court*, including writs, records, pleadings, affidavits, and documents filed in the High Court, are usually proved by office copies (*i.e.* copies sealed with a seal of the central office) (R. S. C. Order 37, r. 4; Order 38, r. 15; Order 65, r. 27; Order 61, r. 7. As to the production of the original, see Order 61, r. 28; and as to the cases when it is necessary to produce the original, Taylor on *Evidence*, s. 1535). They may also be proved by exemplifications and by examined copies (*Reid v. Margison*, 1808, 1 Camp. 469).

*Proceedings in divorce* and matrimonial causes deposited in the Probate Division are proved by copies certified by a registrar to have been examined with the original (Divorce Rules, rr. 118–120).

*Bankruptcy* proceedings, affidavits, etc., are proveable by copy certified by the registrar (46 & 47 Vict. c. 52, s. 134); and notices inserted in the *London Gazette*, by a copy thereof (*ibid.* s. 132).

*County Court proceedings*, by production of the book in which they are entered, or by a copy thereof sealed by the Court and purporting to be signed and certified by the registrar.

*Wills* are public documents, and are proveable by production of the probate (see EVIDENCE, vol. v. p. 94).

*Official Registers* of births, deaths, marriages, burials, baptisms, and many other public documents of an official character, may be proved by certified copy in accordance with the following provision:—

“Whenever any document is of such a public nature as to be admissible in evidence on its mere production from the proper custody, and no statute exists which renders its contents proveable by means of a copy, any copy thereof or extract therefrom shall be admissible in evidence . . . provided it be proved to be an examined copy or extract, or provided it purport to be signed and certified as a true copy or extract by the officer to whose custody the original is intrusted, any which officer is hereby required to furnish such certified copy or extract to any person applying at a reasonable time for the same upon payment of a reasonable sum for the



same, not exceeding fourpence for every folio of ninety words" (14 & 15 Vict. c. 99, s. 14).

There are many other statutes which make provision for the proof by certified copy of particular books and documents of a public nature. Many of these will be found collected in Taylor on *Evidence*, pp. 1049–1070, but the consideration of them belongs rather to the particular branches of the law with which they are severally connected than to the law of evidence.

*Proof of Certified Copies.*—In the case of all documents which may be proved by certified copies, it is sufficient if the copy *purports* to be duly certified. "Whenever, by any act now in force or hereafter to be in force, any certificate, official or public document, or document or proceeding of any corporation or joint-stock or other company, or any certified copy of any document, by-law, entry in any register or other book, or of any other proceeding, shall be receivable in evidence of any particular . . . the same shall respectively be admitted in evidence, provided they respectively purport to be sealed or impressed with a stamp, or sealed and signed, or signed alone, as required, or impressed with a stamp and signed as directed by the respective Acts made or to be hereafter made, without any proof of the seal or stamp, where a seal or stamp is necessary, or of the signature, or of the official character of the person appearing to have signed the same, and without any further proof thereof in every case in which the original record could have been received in evidence" (8 & 9 Vict. c. 113, s. 1).

(2) *Public Documents as Media of Proof.*—Public documents which are available as media of proof consist for the most part either of the proceedings of some department of the State, or of some public authority acting under statutory powers for the benefit of the community, or of public records of specific classes of facts duly entered and kept by public officials in pursuance of a duty imposed on them in that behalf (Wills on *Evidence*, p. 178).

*Public Statutes* are *prima facie* evidence of facts recited in their preambles (*R. v. Sutton*, 1816, 1 M. & S. 532), but a private Act or local Act is only evidence of facts stated in it as against those who were parties to it, although as regards mode of proof the Act be declared to be a public Act of which the Courts will take judicial notice (*Brett v. Beales*, 1829, Moo. & M. 416, 421; *Bullard v. Way*, 1836, 1 Mee. & W. 520, 529). In this sense it is a private document, though as regards mode of proof it is a public document (see above).

The *London Gazette* is evidence of royal proclamations and acts of State (*R. v. Holt*, 1793, 5 T. R. 436), but not of other matters (*R. v. Gardner*, 1810, 2 Camp. 513; 11 R. R. 784), except such as various statutes provide may be proved in that way (see, *e.g.*, the Bankruptcy Act, 1883, 46 & 47 Vict. c. 52, by several sections of which the *Gazette* is made evidence of various facts stated therein).

*Official registers* of births, deaths, and marriages are evidence of the facts properly stated therein, such as the facts, and generally the date and other particulars of the event recorded (see PEDIGREE, PROOF OF).

The register kept at Stationers' Hall is evidence of copyright (5 & 6 Vict. c. 45, s. 11), and the register of shareholders of a company is evidence of the facts authorised to be inserted therein (25 & 26 Vict. c. 89, s. 37).

Registers of British vessels are *prima facie* evidence of their contents.

*Bankers' books* are *prima facie* evidence of the matters, transactions, and accounts therein recorded (42 & 43 Vict. c. 11, s. 3; see above as to the banks to which this provision applies, and the mode of proving the books).

A *conviction* of an indictable offence may be proved by a certificate from



the Clerk of the Court (17 & 18 Vict. c. 125, s. 25; 28 & 29 Vict. c. 18, s. 6; and see 14 & 15 Vict. c. 99, s. 13).

A certificate of justices is proof of the dismissal of an information in cases punishable summarily (42 & 43 Vict. c. 49, s. 27 (4)).

A *report of the official receiver* in bankruptcy is in certain proceedings evidence of the truth of those facts (53 & 54 Vict. c. 71, s. 8 (5)); and a certificate of incorporation of a company is conclusive evidence of its incorporation and registration (25 & 26 Vict. c. 89, ss. 18 and 192).

There are many other documents which by statute are made evidence of particular facts. They will be found under the particular subject-matters to which they relate.

[*Authorities*.—See Taylor on *Evidence*, ss. 1479–1785; Wills on *Evidence*, pt. iii. ch. 12, pt. iv. ch. 7, and App.]

**Public Records; Public Record Office.** — See RECORDS; RECORD OFFICE.

**Public Recreation.**—1. Parish Councils are authorised—

(a) To acquire lands for public pleasure and recreation under the adoptive Public Improvements Act, 1860, 56 & 57 Vict. c. 73, s. 7;

(b) To exercise the power of an urban authority over any recreation ground, village green, open space, or public walk under their control, or to the cost of which they have contributed (56 & 57 Vict. c. 73, s. 8).

These provisions are in addition to those under the Inclosure Acts. See COMMON.

2. Urban District Councils are authorised by sec. 164 of the Public Health Act, 1875, to buy or lease lands for public walks and pleasure grounds, and to regulate them when acquired. See OPEN SPACES.

**Public Refreshment.**—See REFRESHMENT HOUSE.

**Public Resort.**—See PLACE.

**Public School.**—There is no legal definition of the term “public school.” The Public Schools Acts, 1868 to 1873, apply only to “certain public schools” therein named. The Property Tax Act, 1842 (5 & 6 Vict. c. 35), exempts from income tax—(a) the buildings of “any hospital, public school, or almshouse”; (b) the rents and profits of lands belonging to such institutions so far as the same are applied to charitable purposes. See article INCOME TAX, vol. vi. p. 339.

In the case of *Blake v. Mayor, etc., of City of London*, 1887, 19 Q. B. D. 79, it was held that the City of London School, a school maintained partly by endowment, under public control, and not carried on for profit, was a public school within the meaning of the Property Tax Act.

For general purposes the term “public school” may perhaps be taken to mean the opposite of a private venture school, *i.e.* a school carried on for the public benefit under public control.

*The Public Schools Acts, 1868 to 1873.*—The schools comprised in the Public Schools Acts, 1868 to 1873, are Eton, Winchester, Westminster,



Charterhouse, Harrow, Rugby, and Shrewsbury. The principal Act conferred certain temporary powers of making statutes and schemes upon governing bodies and a body of special commissioners, whose powers have now expired. The governing bodies have permanent power to repeal and alter statutes (31 & 32 Vict. c. 118, s. 11), subject to the approval or disapproval of the Queen in Council (ss. 9, 10); also to make "regulations" with reference to the conduct of the schools (s. 12). It is provided that the charges made for the maintenance and education of the boys are to be kept distinct, and that the headmaster shall be consulted and be at liberty to submit proposals as to regulations (*ibid.*). The headmaster holds office at the pleasure of the governing body (s. 13; cp. *Hayman v. Governors of Rugby School*, 1874, L. R. 18 Eq. 28).

The governing bodies of all the schools included in the Public Schools Acts are incorporated with power to hold land without licence in mortmain (31 & 32 Vict. c. 58, s. 2). And Part II. of the Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), does not apply to assurances "in trust for any of the colleges of Eton, Winchester, and Westminster, for the better support and maintenance of the scholars only upon the foundations" (51 & 52 Vict. c. 42, s. 7). The colleges of Eton and Winchester are specially exempted from the Charitable Trusts Acts (Charitable Trusts Amendment Act, 1855, 18 & 19 Vict. c. 124, s. 49). And all the schools comprised in the Public Schools Acts are exempted from the Endowed Schools Acts (Endowed Schools Act, 1869, 32 & 33 Vict. c. 56, s. 8; cp. *A.-G. v. Christ Church, Oxford*, [1894] 3 Ch. 524).

[*Authority.*—Tudor's *Charitable Trusts*.]

**Public Service.**—In *Grenville-Murray v. Clarendon*, 1869, L. R. 9 Eq. 11, it was laid down that funds voted by Parliament for the public service are not trust funds in the hands of the Secretaries of State, who receive them from the Treasury; and the Court of Chancery has no jurisdiction to take any account of the application of such funds.

As to powers of classifiers under the Public Service Act (Victoria), 1883, s. 49, see *Main v. Stark*, 1890, 15 App. Cas. 384.

**Public Ship.**—See BRITISH SHIP; NAVY; etc.

**Public Statutes.**—Statutes are either public or private. With respect to the distinction between public and private statutes, it is to be observed that the Courts are bound to take notice judicially of the former, but they were not bound to take judicial notice of the latter; however, by 13 & 14 Vict. c. 21, every statute made after the year 1850 was to be taken to be a public one, and judicially noticed as such, unless the contrary was therein expressly declared; and that statute has now been repealed by the Interpretation Act, 1889 (52 & 53 Vict. c. 63), and in lieu thereof it has been now provided that every Act passed, or to be passed, after the year 1850 shall be a public Act, and shall be judicially noticed as such, unless the contrary is expressly provided by the Act (1 Steph. *Com.* 70, 11th ed.).

**Public Stores.**—Stores the property of Her Majesty or of any department of the Government are directed by the Statute 38 & 39 Vict.



c. 25 (The Public Stores Act, 1875) to be marked with certain marks to distinguish them from private property, and the use of these marks by other persons is prohibited.

By the Statute 9 & 10 Will. III. c. 41, s. 1 (now repealed), these marks were directed to be—in cordage above three inches, a white thread laid the contrary way; in smaller cordage, a twine in lieu of the thread; in canvas, a blue streak in the middle; and any other stores the broad arrow.

By the statutes now in force the marks of naval and other stores are directed to be as follows (38 & 39 Vict. c. 25, sched.):—

Hempen cordage and wire rope.—White, black, or coloured worsted threads laid up with the yarns and wire respectively.

Canvas, fernaught, hammocks, and seamen's bags.—A blue line in a serpentine form.

Buntin.—A double tape in the warp.

Candles.—Blue or red cotton threads in each wick, or wicks of red cotton.

Timber, metal, or any stores not enumerated.—The name of Her Majesty, her predecessors, her heirs and successors, or any public department, or any branch thereof, or the broad arrow, or a crown, or Her Majesty's arms; whether such broad arrow, crown, or arms be alone or in combination with any such name as aforesaid, or with any letters denoting such name.

Of these marks the most interesting is the broad arrow, the origin of which cannot be ascertained, and the commencement of the use of which goes back at least to the time of Richard the Second, and must in all probability be assigned to a much earlier date.

In 1386, in Letter Book H., fol. ccix., in the records of the city of London, an entry occurs which relates how one Thomas Stokes was accused of having pretended to be an officer and a taker of ale for the household of the king, and that he had marked several barrels full of ale with a mark called "arewehede," saying that these barrels were for the household of our lord the king (*Memorials of London and London Life*, p. 489).

This is apparently the earliest use of the broad arrow that is on record, but, from the manner in which it is mentioned, it is obvious that it was then the recognised royal mark.

In 18 Rymer's *Fædera*, 978, we find that in 1627 Charles I. appointed that "all muskets and other armes yssued out of his Majestie's stores for Land Stores shall be marked with the marke of C. R., and for sea service with the marke of C. R. and an anchor, whence some (including Samuel Pepys at one time) thought that the broad arrow was a rough attempt at representing an anchor, but the earlier use of the broad arrow shows that this cannot be so. Some have thought that the broad arrow was intended to represent the pheon in the arms of Henry Viscount Sydney, who was Master-General of the Ordnance from 1693 to 1702, or in those of the Lisle family. Others derive the mark from the form of the Celtic letter *á*. A correspondent in *Notes and Queries*, series i. vol. v. p. 189, says: "Sailors and longshoremen call it the broad ar, and arr or ar is used in the North of England to denote a mark."

Public stores are protected by several statutes, the earliest of which that is now in force is 12 Geo. III. c. 24 (The Dockyards, etc., Protection Act, 1772). This statute imposes the penalty of death on burning or destroying military, naval, or victualling stores.

29 & 30 Vict. c. 109 (The Naval Discipline Act, 1866) makes burning a magazine not belonging to the enemy punishable with death (s. 34). Embezzlement of stores is punishable with imprisonment (s. 33).



Obliterating Government marks is felony, and punishable with penal servitude up to seven years (38 & 39 Vict. c. 25, s. 5). Unlawful possession of Her Majesty's stores is misdemeanour (s. 7).

By sec. 8 of the same Act, gathering or searching for stores, or creeping, sweeping, or dredging in the sea is prohibited within one hundred yards from any of Her Majesty's vessels, wharves, etc., and within one thousand yards from any ranges, under penalty of a fine not exceeding £5, or imprisonment not exceeding two months if proceeded against summarily (s. 8). Offenders against this and the previous section are also liable to be indicted.

As to the provision of temporary supplies of medicine, etc., to hospitals, see Public Health Act, 1875, s. 133; and Public Health (London) Act, 1891, s. 77.

**Public Trade.**—See PUBLIC BUSINESS.

**Public Undertaking.**—See *Wigram v. Fryer*, 1887, 36 Ch. D. 87; *Blaker v. Herts and Essex Water Co.*, 1889, 41 Ch. D. 399; *Gardner v. London C. & D. Rwy. Co.*, 1867, 36 L. J. Ch. 323.

In sec. 1 of the Lands C. C. Act, 1845 (8 & 9 Vict. c. 18), "undertaking" means an undertaking of a public nature; and does not include such an undertaking as the Westminster Palace Hotel (*Wale v. West. Pal. Hot. Co.*, 1860, 8 C. B. N. S. 276) or Sion College (*In re Sion College*, 1886, 55 L. T. 589).

**Public Use.**—A public use of an invention does not mean a general use, but a use in public, as distinguished from one that is secret (*Carpenter v. Smith*, 1842, 11 L. J. Ex. 213). Where a pavement had been laid in a covered portico of a private house, the use was considered sufficiently public to avoid a patent for a similar pavement (*Stead v. Williams*, 1844, 2 Web. P. C. 136). One Jackson, having publicly ridden a bicycle, called by the neighbours "Jackson's threshing machine," was held to have anticipated by public user a patent for a similar machine (*Brereton v. Richardson*, 1884, 1 R. P. C. 173).

But though prior public user will invalidate a patent for an invention, the mere public use of articles made according to the invention, but whose nature is not such that by looking at them an expert could tell how they were made, will not of itself invalidate a subsequent patent (*Hancock v. Somervell*, 1851, 39 Newton's *London Journal*, 158).

**Public Way.**—Sir Edward Coke makes a threefold classification of ways according to the extent of the right of passage over them: "There be three kind of wayes whereof you shall reade in our ancient bookes. First, a footway, which is called *iter quod est jus eundi vel ambulandi hominis*; and this was the first way. The second is a footway and horseway, which is called *actus ab agendo*; and this vulgarly is called *packe* and *prime way*, because it is both a footway, which was the first or *prime way*, and a *packe* or *drift way* also. The third is *via aditus*, which contains the other two, and also a cartway, etc., for this is *jus eundi, vehendi, et vehiculum et jumentum ducendi*; and this is twofold, namely, *regia via*, the king's highway for all men, *et communis strata* belonging to a city or towne, or between neighbours and neighbours" (*Co. Litt.* 56 a).



HIGHWAYS are public roads, which every subject of the kingdom has a right to use. They exist either by prescription, by authority of local Acts of Parliament, or by dedication to the use of the public.

Generally, proof of a right of cartway or carriageway will establish a right for the passage of all carts or carriages. This right will include a right of footway, and also of driftway and bridleway; and a right of driftway or bridleway (but not of carriageway) will include a right of footway. But exceptional cases exist, where the wider right does not include the narrower, and these presumptions may be controlled and rebutted either by the provisions of an Act of Parliament, or by the act of the person who dedicates the highway or grants the easement.

In the various statutes relating to the maintenance and control of public ways, the term highway is used in a more limited sense, and must be distinguished from several cognate terms, such as bridges, turnpike roads, main roads, and streets.

By sec. 26 of the Local Government Act, 1894, it is the duty of every district council to protect all public rights of way, and to prevent as far as possible the stopping or obstruction of them. See Pratt on *Highways*.

**Public Works Loans.**—The Public Works Loans Act, 1875 (38 & 39 Vict. c. 89), which repealed twenty-seven previous statutes on the same subject, made provision for the constitution of a body to be called "The Public Works Loan Commissioners," who are authorised to make loans for certain public purposes, which are enumerated in the first schedule to the Act, as: Baths and washhouses provided by local authorities; burial grounds provided by burial boards, or (in Scotland) by burial boards or parochial boards; conservation or improvement of rivers or main drainage; labourers' dwellings; lighthouses, buoys, etc.; lunatic asylums of any county or borough in Great Britain; police stations and justices' rooms of any county or borough in Great Britain; prisons; public libraries and museums; waterworks established or carried on by a sanitary or other local authority; workhouses; any work for which a sanitary authority are authorised to borrow under the Public Health Act, 1875, etc.

The Act 40 & 41 Vict. c. 19 amends the Public Works Loans Act, 1875, and confirms the powers of the Public Works Loan Commissioners under sec. 243 of the Public Health Act as to reduction of interest on loans to sanitary authorities.

The Act of 1875 is further amended by the following statutes, also dealing with loans for public works: 41 & 42 Vict. c. 18; 42 & 43 Vict. c. 35; 42 & 43 Vict. c. 77; 44 & 45 Vict. c. 38; 45 & 46 Vict. c. 62; 46 & 47 Vict. c. 42; 49 & 50 Vict. c. 45; 50 & 51 Vict. c. 37; 52 & 53 Vict. c. 71; 53 & 54 Vict. c. 50.

**Public Worship Regulation Act.**—By the Public Worship Regulation Act, 1874, in addition to the already existing law regulating church discipline, an alternative and more simple form of procedure was introduced as regards any unlawful proceedings relating to the ritual, ornaments, and fabric of the church (Cripps, *Laws of the Clergy*, 45, quoting *Julius v. Bishop of Oxford*, 1879, 4 Q. B. D. 277, 602); but the use made of it has been small, for in twenty years only nine cases have been brought under this Act (Phillimore, *Eccl. Law*, 2nd ed., ii. 1036), and it is now practically dead. Proceedings under this Act do not come within the



scope of the Statute of 1840 (3 & 4 Vict. c. 86, s. 23), which prohibits all proceedings against clerks not in accordance with its provisions (s. 4); and nothing in this Act is to affect or repeal any jurisdiction in force for the due administration of ecclesiastical law (s. 5).

The judge who exercises the jurisdiction given by the Act is the Dean of the Arches (but see ARCHES, COURT OF), and that jurisdiction is set in motion and regulated as follows:—

If the archdeacon of the archdeaconry, or a churchwarden of the parish, or any three parishioners of the parish (which term means any parish, ecclesiastical district, chapelry, or place over which any incumbent has the exclusive cure of souls (s. 6)) in or for which any church or burial-ground is situate or provided respectively, and in case of collegiate or cathedral churches, any three inhabitants of the diocese, male persons of full age, who have signed and sent to the bishop a declaration (in the form provided by the statute) that they are members of the Church of England, and who for one year previously to taking any proceeding have had their usual place of abode in that diocese, think that (1) in such church the fabric, ornaments, or furniture have been altered or added to without lawful authority, or any illegal decoration introduced therein; or (2) that the incumbent has, within the preceding twelve months, allowed any unlawful ornament of the minister of the church to be used therein or in the burial-ground, or has neglected to use any prescribed ornament or vesture; or (3) that the incumbent has failed to observe within the preceding twelve months the directions of the Book of Common Prayer relating to the performance in such church or burial-ground of the services, rites, and ceremonies ordered by that book, or has made or permitted such services, rites, and ceremonies to be unlawfully added to, altered, or omitted: such persons may represent the same to the bishop in the form prescribed by the Act, and with the declaration (under 5 & 6 Will. IV. c. 62) affirming the truth of the facts represented; provided that no proceedings can be taken hereunder as regards any alteration or addition to the fabric of a church completed five years before (s. 8). A succeeding churchwarden cannot be substituted for a retired churchwarden who has begun a suit for acts done during his term of office, but the latter can continue it (*Perkins v. Enraght*, 1881, 7 P. D. 31, 161). The “parishioners” must be parishioners at the date of the representation (*Hudson v. Tooth*, 1877, 2 P. D. 125, 127). The bishop may, after considering the whole circumstances of the case, be of opinion that proceedings should not be taken on the representation, and if so, he must state in writing his reasons for his opinion, and such statement must be deposited in the registry of the diocese, and a copy of it sent to the persons making the representation and the person complained of, and the proceedings thereupon come to an end. The bishop has a general and unfettered discretion in the matter; “whether the reasons for his decision are good or bad, they cannot be reviewed if he has considered all the circumstances which appear to him, honestly exercising his judgment, to bear upon the particular case, and upon the question whether he ought to prevent proceedings being taken”; and “such inquiry into all the circumstances of the case may justly include considerations of the good to be done or the mischief involved in such proceedings” (Lord Herschell and Lord Halsbury in *R. v. Bishop of London*, [1891] App. Cas. 666, St. Paul’s Cathedral reredos case). Otherwise the bishop must (*Howard v. Bodington*, 1877, 2 P. D. 203) within twenty-one days of receiving the representation, send a copy of it to the person complained of, and require him and the person making the representation to state in writing within



twenty-one days whether they will submit to his directions in the matter without appeal. If they consent, the bishop may hear the case and give judgment, and issue a monition, without appeal; but not finally to decide any question of law so as to prevent it being raised again by other parties. The parties may also, after representation made to the bishop, join in stating a special case for the judge under the Act, and require the bishop to send it to the judge for hearing, and the judgment of the bishop must conform to the determination of the judge thereon. If the parties do not so consent, the bishop must send the representation to the archbishop of the province, who must thereupon require the judge to hear it at any place in the diocese or province, or in London or Westminster; and unless the judge hears it within the limits named, the proceedings are void (*Serjeant v. Dale*, 1877, 2 Q. B. D. 558; *Hudson v. Tooth*, 1877, 3 Q. B. D. 46; *Green v. Lord Penzance*, 1881, 6 App. Cas. 657). Provision is then made for due notice (twenty-eight days) being given to the parties of the time and place for hearing the representation; for taking proper security for costs from the person making the representation, *i.e.* by deposit or bond with sureties; for the person complained of in twenty-one days after such notice answering the representation, but default of answering is taken to be a denial of it; for evidence being given *viva voce* in open Court and upon oath; and for the judge having all the powers of a Court of record, and of a superior Court of law or equity in enforcing attendance of witnesses and the production of evidences, books, or writings; for the judge, unless otherwise agreed, stating the facts proved before him in the form of a special case; and for delivering judgment, issuing monitions, making orders as to costs. An appeal lies to the Judicial Committee, and proceedings may be stayed pending an appeal (s. 9). The registrar of the diocese performs the duties required under the Act (s. 10). The parties may appear in person or by counsel (s. 11). No fresh evidence can be admitted on appeal except by leave of the Appellate Court (s. 12).

Monitions or orders of a bishop or judge are enforced by an inhibition to the incumbent from performing any service of the church or otherwise exercising the cure of souls within the diocese for a term not exceeding three months; and such inhibition shall not then be relaxed unless the incumbent undertakes in writing to obey such monition or order; and if such inhibition remain in force for more than three years from the issue of the monition or final hearing of an appeal therefrom, whichever last happens, or if a second inhibition in regard to the same monition be issued in three years from the relaxation of an inhibition, any benefice or preferment held by the incumbent in the parish in which the church or burial-ground is situated, or for the use of which the burial-ground is legally provided, and with regard to which the monition has been issued, shall thereupon become void, unless the bishop for some special reason given in writing postpone the date of such avoidance; and upon any such avoidance the patron of the benefice or preferment may fill the same as if the incumbent were dead. On a benefice so becoming void, of which the incumbent has been imprisoned for contempt of Court, such contempt is satisfied by his involuntary obedience, and application can be made for his release (*Dean v. Green*, 1882, 8 P. D. 79). The provisions of 1 & 2 Vict. c. 106, s. 58, as to notice to patron and lapse, are made applicable to such avoidance, and the incumbent by whom the benefice was avoided cannot be reappointed thereto at any time. The bishop may during such inhibition make provision for the spiritual charge of the parish, and raise the sum required therefor by sequestrating the profits of the benefice. The bishop or judge decides whether



a monition or order made after proceedings before them has been obeyed or not, and the judge directs the taking of proceedings to enforce obedience thereto (s. 13). Obedience to an inhibition may be enforced by process of significavit and writ *de contumace capiendo*, i.e. for contempt, issued by the High Court for arrest and imprisonment, like any other order of an Ecclesiastical Court (*Green v. Lord Penzance*, 1881, 6 App. Cas. 657). A monition may order certain specified acts, and all practices, acts, matters, and things of the same or a like nature, or permitting the same to be discontinued; and an inhibition which recites such a monition, and disobedience in several matters specified in the monition, and also in some other matters not specified therein, is valid (*Enraght v. Lord Penzance*, 1882, 7 App. Cas. 240).

A faculty is not necessary in order to obey a monition issued under the Act, unless the judge so direct; but this is not to limit the discretion of the ordinary, and such faculty, if unopposed, is to be granted on payment of a small fee (s. 14). Notices are to be served according to the rules and orders under the Act (s. 15). If the bishop is patron of the benefice of which the incumbent is the subject of the representation, or is unable from illness to discharge his duties as to a representation under the Act, the archbishop of the province acts in his place; and if the archbishop is prevented from acting for a like reason, an archbishop or bishop may be appointed by the Royal sign-manual to take his place for this purpose (s. 16). In the case of a cathedral or collegiate church, the visitor takes the place of the bishop for purposes of the Act. In any complaint made about the fabric, ornaments, furniture, or decorations of such a church, the dean and chapter of such church must be the person complained of; and in case of non-obedience to a monition relating thereto, the visitor or the judge have power to enforce the terms of the monition and raise the cost thereof by sequestrating the profits of the preferments of the dean and chapter in such church. In the case of any complaint about the ornaments of the minister in such a church, or the observance therein of the directions of the Book of Common Prayer, relating to the performance of the services, rites, and ceremonies ordered by that book, an alleged addition to, alteration of, or omission from such services, etc., the person complained of must be the clerk alleged to have so offended; and in the event of non-obedience to a monition the visitor or judge has the same power as to inhibition, and the preferment held in such church by the person complained is liable to the same conditions as to avoidance, notice, and lapse, subsequent appointment, and performance of duties as apply in the case of an incumbent (s. 17). In case of sentence by consent, or a suit having been begun against any incumbent under the Church Discipline Act, 1840, an incumbent is not liable to proceedings under this Act in respect of the same matter; and he is not liable to proceedings under that Act in respect of a matter adjudicated upon under this Act (s. 18). Power is given to make rules of procedure and settle fees in proceedings under the Act by Order in Council (and this has been done by Orders in Council of June 28, 1875, and February 22, 1879; 4 P. D. 250); such power to make rules includes the power to make forms, and forms so made have statutory authority, and a monition and inhibition are valid if in accordance therewith (*Dale's case*, 1881, 6 Q. B. D. 376); and such rules can be altered and amended in the same way. They must be laid before Parliament within forty days after being made, if Parliament is then sitting, if not, in forty days after its next meeting; and they may be annulled on an address being presented by either House against them in the next subsequent forty days (s. 19).

[*Authorities.*—Phillimore, *Ecclesiastical Law*; Cripps, *Laws of the Clergy*.]



**Publisher.**—The relations between the publisher of a book and the author depend on the nature of the contract between them. Such contracts are personal, and the publisher cannot sue for specific performance in case of breach of contract by the author, his remedy being an action for damages (see **AUTHOR**). Further, the contract being a personal one, the publisher may not assign the benefit of it to another firm or to their successors in business without the consent of the author (*Hole v. Bradbury*, 1879, 12 Ch. D. 886); and the firm to whom such benefit has purported to be assigned will be restrained from proceeding with the publication. This rule extends to the case where the publisher is a limited company, and in case of winding-up the Court will restrain the receiver from assigning the benefit of a publishing agreement without the consent of the author (*Griffith v. Tower Publishing Co.*, [1897] 1 Ch. 21).

Under the Newspaper Libel and Registration Act of 1881, 44 & 45 Vict. c. 60, s 9, the duty is thrown on the publisher of a newspaper ("the printers and publishers for the time being") of registering the paper at Somerset House on or before the 30th July in every year. To neglect to make this return involves a penalty of £25, and the making of a false or misleading return is visited with a penalty of £100.

The publisher of a book, periodical, or newspaper, is primarily liable, civilly and criminally, for libels appearing therein. In criminal cases, however, it is a good defence to prove that the publication was made without the authority, consent, or knowledge of the defendant, and that the said publication did not arise from any want of due care or caution on his part (Lord Campbell's Act, 1843, 6 & 7 Vict. c. 96, s. 7). In a civil action the publisher of a newspaper is liable, even though the publication takes place in his absence and without his knowledge. A publisher is, therefore, justified in refusing to publish a book, even after it has been set up in type by him, if he finds it contains libellous, blasphemous, or otherwise illegal matter.

**Puffer.**—See **AUCTION** (*Mock Auction*).

**Puis darrein continuance.**—See **PLEADING** (*ante*, p. 109).

**Puisne** (from Fr. *puisé*)—Junior or inferior in rank. The several judges and barons of the former Common Law Courts at Westminster, other than the chiefs, were called *puisne*. By the 40 & 41 Vict. c. 9, s. 5, a "puisne judge" is defined as a judge of the High Court other than the Lord Chancellor, the Lord Chief-Justice of England, the Master of the Rolls, the Lord Chief-Justice of the Common Pleas, and the Lord Chief Baron, and their successors respectively.

*Mulier puisné* is the younger legitimate brother, preferred before an elder brother born out of wedlock.

**Pull Down.**—See **DEMOLISH**.

**Pulpit.**—Sermons were in the Primitive Church usually preached from the steps of the altar, and pulpits were only used on special occasions



(Ayliffe, *Par.* 121). Gradually, however, pulpits became universal. Canon 83 of the Canons of 1603 provides that the churchwardens and questmen, at the common charge of the parishioners, shall provide a comely and decent pulpit, to be set in a convenient place within the same at the discretion of the ordinary, and there to be seemly kept for the preaching of God's word.

[*Authorities.*—Ayliffe, *Par.* at p. 121; Steer, *Parish Law*, 5th ed.; Phillimore, *Eccl. Law*, 2nd ed.]

**Pumping Station.**—In *R. v. Metropolitan Board of Works*, 1868, L. R. 4 Q. B. 15, it was held that sewers were not rateable to the poor rate, on the ground that they were not the subject of a beneficial occupation; but that a pumping station was rateable, as it had an occupation value.

**Pumping Water.**—With regard to a mine, see *Strelley v. Pearson*, 1880, 15 Ch. D. 113.

**Punctuation.**—Owing to the ease with which marks of punctuation might be fraudulently introduced into deeds and other written legal instruments, their presence or absence is not regarded; and according to some authorities, even in the case of Statutes of Parliament, they have no material weight.

**Punjab.**—See BRITISH INDIA.

**Pur autre vie.**—See LIFE, ESTATES FOR.

**Purchase; Purchase Money.**—See SALE OF GOODS; VENDOR AND PURCHASER.

## Purchaser for Value without Notice.

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### GENERALLY.

As regards cases where this plea is coupled with the legal estate the subject is as important now as before the Judicature Acts, but as regards



cases where it is raised without the legal estate, the subject has become of less importance since the Judicature Act, 1873, than it was before, because by that Act, and the construction put upon it by the Court of Appeal and House of Lords in *Ind Coope v. Emmerson*, 1886, 33 Ch. D. 323; 12 App. Cas. 300, *infra*, the defence of purchaser for value without notice by the owner of an equitable estate has been destroyed in one large class of cases, *i.e.* the applications to what was called the auxiliary jurisdiction of the Court of Chancery.

#### THE THREE CASES PUT BY LORD WESTBURY IN *PHILLIPS v. PHILLIPS*.

To understand the position, it must be remembered that formerly the Court of Chancery only entertained the claims of plaintiffs suing on a legal title in certain cases which are thus given in 2 *L. C. Eq.*, ed. 1897, p. 157:—

(1) Under what was called the “auxiliary jurisdiction,” *i.e.* where a plaintiff suing at law on a legal title, *e.g.* in ejectment which could not have been maintained in Chancery, applied to Chancery for assistance, *e.g.* in ordering discovery in aid of the action which the common law Court could not grant.

(2) In cases where Chancery had concurrent jurisdiction with Courts of law, so that the action might be brought either at law or in equity, as in matters of dower (*Williams v. Lambe*, 1791, 3 Bro. C. C. 264), or tithes (*Collins v. Archer*, 1830, 1 Russ. & M. 284).

(3) Where Chancery had exclusive jurisdiction, as in foreclosure.

(1) *In Application to the Auxiliary Jurisdiction.*—The common instances of this were applications by a plaintiff suing at law on a legal title to Chancery, for discovery, production, or delivery of title-deeds, removal of long terms of years in land, and bills to perpetuate testimony.

The leading case on the defence of purchaser for value without notice in these cases is *Basset v. Nosworthy*, 1673, Rep. t. Finch, 102; also given in 2 *L. C. Eq.*, ed. 1897, p. 150.

The expressions in the judgments in *Basset v. Nosworthy*, and in some of the old cases, were so general in terms as to give rise to a contention that in no case would Chancery give relief as against purchaser for value without notice (see Sug. *V. & P.*, 14th ed., pp. 787–798; *A.-G. v. Wilkins*, 1853, 17 Beav. 285; and this was strongly argued in the case of *Phillips v. Phillips*, 1862, 4 De G., F. & J. 217).

The judgment of Lord Westbury explains the cases in which the defence would prevail before the Judicature Act. He says that the ordinary instances of it were—

First, where an application is made to an auxiliary jurisdiction of the Court by the possessor of a legal title, as by an heir-at-law (which was the case in *Basset v. Nosworthy*, 1673, Fin. 102), or by a tenant for life for the delivery of title-deeds (which was the case of *Wallwyn v. Lee*, 1803, 9 Ves. 24; 7 R. R. 142), and the defendant pleads that he is a *bonâ-fide* purchaser for valuable consideration without notice. In such a case the defence is good, and the reason given is, that as against a purchaser for valuable consideration without notice, the Court gives no assistance, that is, no assistance to the legal title. But this rule does not apply where the Court exercises a legal jurisdiction concurrently with Courts of law. Thus it was decided by Lord Thurlow, in *Williams v. Lambe*, 1791, 3 Bro. C. C. 264, that the defence could not be pleaded to a bill for dower; and, by Sir J. Leach, in *Collins v. Archer*, 1830, 1 Russ. & M. 284, that it was no answer to a bill for tithes. In those cases the Court of equity was not asked to give the plaintiff any equitable as distinguished from legal relief.

The second class of cases is the ordinary one of several purchasers or incumbrancers, each claiming in equity, and one who is later and last in time succeeds in obtaining an outstanding legal advantage, the possession of which may be a protection to himself or an embarrassment to other claimants. He will not be deprived of this advantage by a Court of equity. To a bill filed against him for this purpose by a prior purchaser or incum-



brancer, the defendant may maintain the plea of purchase for valuable consideration without notice, for the principle is that a Court of equity will not disarm a purchaser, that is, will not take from him the shield of any legal advantage. This is the common doctrine of the *tabula in naufragio*.

Thirdly, where there are circumstances that give rise to an equity as distinguished from an equitable estate,—as, for example, an equity to set aside a deed for fraud, or to correct it for mistake,—and the purchaser under the instrument maintains the plea of purchaser for valuable consideration without notice, the Court will not interfere.

(a) *The effect of the Judicature Act on the Defence.*—The Judicature Act of 1873 was passed in order to abolish the separation of jurisdictions of the Chancery and Common Law Courts, and to give every branch of the new High Court power to administer the doctrine both of law and equity (see Judicature Act, 1883, s. 24, subs. 1, 2, 3, 4, 5, 6, and 7).

By sec. 24, subs. 2, it is enacted that the Court—

Shall give to every equitable estate, right, or ground of relief so claimed, and to every equitable defence so alleged, such and the same effect by way of defence against the claim of such plaintiff or petitioner, as the Court of Chancery ought to have given if the same or the like matters had been relied on by way of defence in any suit or proceeding instituted in that Court for the same or the like purpose before the passing of this Act.

and by sec. 25, subs. 11, it is enacted that—

Generally in all matters not hereinbefore particularly mentioned, in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail.

As after the passing of the Judicature Acts, each Court had cognisance in law and equity, and the distinction between the auxiliary and concurrent jurisdictions of Chancery was abolished, the question then arose whether the saving of equitable defences in sec. 24, subs. 2 of the Judicature Act of 1873, cited *supra*, or the enactment in sec. 25, that where there was a conflict equitable rules should prevail, would or not preserve the defence of purchaser for value without notice.

This question was put in issue in the case of *Ind Coope v. Emmerson*, 1886, 33 Ch. D. 323; 12 App. Cas. 300, an action in the Chancery Division by plaintiff, claiming on a legal title, ejectment, discovery, production, and delivery of deeds. From the report in 33 Ch. D. p. 324, it appears that the only thing before the Court was the summons for production, and that there was, and could be, only an order for discovery and production, but the reasoning of the judgments appears to extend to delivery of deeds and whatever was necessary for giving full relief, and to show that the plea cannot be maintained as against plaintiffs claiming under a legal title in those cases in which, before the Judicature Act of 1873, the plaintiff would have sued at law, and applied to the auxiliary jurisdiction of the Court of Chancery, *i.e.* in the first of the three cases stated by Lord Westbury in *Phillips v. Phillips*, *supra*.

(b) *Delivery of Title-Deeds.*—Although before the Judicature Act the Court in several cases allowed the plea of purchaser for value without notice to an application by a legal owner for delivery (see *Wallwyn v. Lee*, 1803, 9 Ves. 24; 7 R. R. 142; and *Joyce v. De Moleyns*, 1845, 2 Jo. & Lat. 374), these cases were distinguished as not applicable where delivery of the deeds was necessary to give complete relief in a case in which the Court had jurisdiction over the whole matter.

In *Newton v. Newton* (1868, L. R. 6 Eq. 135)—a trustee of funds invested on a mortgage in his name deposited the deeds, without notice of the trust,



to secure an advance to himself—it was held by Romilly, M. R., that the *cestui-que trust* was not only entitled to priority over the mortgagees by deposit, but also to delivery of the deeds, he based his decision as to the deeds on the ground that the mortgagees had no interest whatever in the trust fund. In the judgment in the Court of Appeal in the same case, Lord Hatherley said (see 4 Ch. 143, p. 145):—

There appears to us to be a material distinction between such a case as *Wallwyn v. Lee*, 1803, 9 Ves. 142; 7 R. R. 142, and cases in which either in consequence of the fund being in Court, as in *Stackhouse v. Countess of Jersey*, 1841, 1 John. & H. 721, or in consequence of the legal estate being outstanding in a trustee, and the beneficial interest being claimed by several adverse but equally innocent purchasers for value without notice, the Court is called upon to declare, and does declare, the right to the fund or estate in question. In such cases the Court is necessarily called upon to make, and does make a decree against some one or more of such purchasers for value, but as (in the language of Lord St. Leonards in *Smith v. Chichester*, 1842, 2 Dr. & War. 402) “it is clearly settled that the right to the estate confers the right to the possession of the title-deeds,” such a decree would be obviously incomplete in a material particular if, while declaring the plaintiff to be absolutely entitled to the whole beneficial interest in the estate, it left the title-deeds in the possession of one of the defendants claiming to hold them under an adverse title which the same decree declared to have no valid foundation.

In other cases, before the Judicature Act of 1873, or in the case of suits commenced before that Act came in force, the Courts have allowed the plea to a claim for delivery of title-deeds (see *Hunt v. Elmes*, 1860, 2 De G., F. & J. 578; *Heath v. Crealoch*, 1873, L. R. 18 Eq. 215; L. R. 10 Ch. 22), where the L.JJ. refused to order delivery of the deeds in a foreclosure action; the bill in this case was filed in 1870; and see *Thorpe v. Holdsworth*, 1868, L. R. 7 Eq. 139; *Waldy v. Gray*, 1875, 20 Eq. 238, where the bill was filed in August 1873; and V.C. Bacon refused to order delivery.

In cases since the Judicature Act, delivery has been ordered (*James v. Giles*, W. N. 1880, p. 170; *Cooper v. Vesey*, 1882, 20 Ch. D. 611; *Manners v. Mew*, 1888, 29 Ch. D. 775; *In re Ingham*, [1893] 1 Ch. 361).

It has been suggested, however, that on the principle stated by Lord Romilly in *Newton v. Newton*, 1868, L. R. 6 Eq. 141; *Thorpe v. Holdsworth*, 1868, L. R. 7 Eq. 139; and *Heath v. Crealoch*, *supra*, the Court would not order delivery of the title-deeds by a purchaser for value without notice if the delivery were not a necessary incident to giving complete effect to a decree of the Court, at least where the person who has obtained the deeds has some interest in the property. The later decisions, however, *i.e.* in particular the judgment of Stirling, J., in *In re Ingham*, [1893] 1 Ch. 361, and the judgments in *Ind Coope v. Emmerson* and *Cooper v. Vesey*, *supra*, seem to be against this suggestion.

(2) *The Defence to a Claim in respect of an Equity as distinguished from an Equitable Estate.*—In *Ind Coope v. Emmerson* (*supra*), 1886, 33 Ch. D. 329; 1887, 12 App. Cas. 300, the distinction between cases of equitable estates and equities was not touched by the decision. It only dealt with the question whether or not the defence was available in what before the Judicature Acts would have been an application to the auxiliary jurisdiction of Chancery, and it was not necessary to deal with the distinction between equitable estates and “equities”; and in giving judgment in the House of Lords, Lord Selborne referred to the decision of Lord Westbury in *Phillips v. Phillips*, as regards the concurrent jurisdiction, without commenting on the case put by him, in which he held the defence would be available.

In this case, where the plaintiff was claiming an “equity,” as distinguished from an equitable estate, the whole jurisdiction was necessarily in equity.



And it seems that there is nothing in the Judicature Acts, or the decision of the House of Lords in *Ind Coope v. Emmerson*, *supra*, to disturb the third rule laid down by Lord Westbury in *Phillips v. Phillips*, *supra*; and in a case since the Judicature Acts (*Cave v. Cave*, 1880, 15 Ch. D. 639), Fry, J., referred to this distinction taken by Lord Westbury in *Phillips v. Phillips*, 1862, 4 De. G., F. & J. 217, cited *supra*, between an equitable estate and an equity, and the rule that the defence would not be good as against a claim in respect of an "equitable estate," but that it would be good "where there are circumstances that give rise to an equity as distinguished from an equitable estate, as, for example, an equity to set aside a deed for fraud, or to correct it for mistake." Fry, L.J., treats this as a binding statement of the law, and says, "Now the question I have to determine is this. Is the right of the parties to follow this money into the land an equitable estate or interest, or is it an equity as distinguished from an equitable estate?" And his decision is based on the ground that it was an equitable estate.

Still it does not appear in the facts of the case that it was necessary for the decision to deal with the rule as to equities.

It is to be observed that the cases of *Colyer v. Finch* and *Finch v. Shaw*, 1854, 19 Beav. 500, and 5 H. L. 913, were referred to by Lord Westbury in *Phillips v. Phillips*, *supra*, and therefore the expressions in them which seem not to recognise the distinction between equities and equitable estates must have been treated by Lord Westbury, as to be explained by the question at issue in other cases whether the plea was an answer to a bill for foreclosure.

And until there is an express decision to the contrary, the statement of the law by Lord Westbury and Mr. Justice Fry must be taken as correct, although there is some difficulty in extracting the principle as a ground of decision in any of the earlier authorities.

*Bell v. Cundall*, decided in 1750, Amb. 101, is referred to as an old case establishing the doctrine. In that case there was a bill in Chancery to rectify a mistake in a common recovery, it appearing that the remainderman, "upon the foot" of the mistake, had sold for valuable consideration; Lord Hardwicke refused as against the purchaser to enforce the equity to correct the mistake. It does not appear whether the purchaser had got the legal estate or not. See also observations in *Bowen v. Evans*, 1844, 1 Jo. & Lat. 178, see p. 263, where no conveyance had been made; see also, as to a deed being executed by parties in ignorance or mistake as to their rights, *Malden v. Menill*, 1749, 2 Atk. 8; *Marshall v. Collett*, 1835, 1 Y. & C. Ex. 238; and see judgment of Knight-Bruce, V.C., in *Penny v. Watts*, 1848, 2 De G. & Sm. 501, see p. 521; and see, as against an equity to set aside a deed for fraud, *Sturge v. Starr*, 1833, 2 Myl. & K. 195.

(3) *The Defence of Purchaser for Value without Notice with the Legal Estate*.—The plea of purchaser for value without notice, together with the legal estate, is still available both against equitable estates as well as equities.

Lord Westbury, in *Phillips v. Phillips*, only puts the case of a man advancing his money without notice, and subsequently, after notice of a prior equitable encumbrance, obtaining the legal estate, and claiming the protection of it against the equitable encumbrance. This is simply "tacking," which is dealt with *s.v.* In the case of tacking, the *sine qua non* is that the money should have been advanced without notice. With some exceptions this will be sufficient, and the legal estate may be acquired after notice of a prior equitable estate. The rule applies with still greater force to give the right to protection of the legal estate where the legal estate is obtained without notice at the same time as the payment of the money



(*Pilcher v. Rawlins*, 1871, L. R. 7 Ch. 274; *Jones v. Powles*, 1834, 3 Myl. & K. 581, discussed and approved of by V.C. Wood in *Carter v. Carter*, 1857, 3 Kay & J. p. 638; *Young v. Young*, 1867, L. R. 3 Eq. 801; *Kettlewell v. Watson*, 1884, 26 Ch. D. 501; and see 2 *L. C. Eq.*, ed. 1897, pp. 168–170; *Cave v. Cave*, 1881, 15 Ch. D. 639; and per Wright, J., *Powell v. London, etc.*, [1893] 1 Ch., see p. 615).

And see, as to the position where the purchaser has only to get some ministerial act done to complete his legal title, *Powell v. London and Provincial Bank*, [1893] 1 Ch. 610, and the discussion of the authorities in that case by Wright, J. But as all these cases depend on the same principle as those of tacking, which are the most common, they are treated *infra*, under that head.

#### WHO ARE PURCHASERS.

In the leading case of *Basset v. Nosworthy*, 1673, Fin. 102; 2 *L. C. Eq.*, ed. 1897, Lord Keeper Finch said: "In purchases the question is not whether the consideration be adequate, but whether 'tis valuable, for if it be such a consideration as will make the defendant a purchaser within the Statute of Elizabeth, and bring him within the protection of that law, he ought not to be impeached in equity." Sir T. Plumer, V.C., in *Copis v. Middleton*, 1817, 2 Madd. 410; 17 R. R. 226, see p. 432, cited this statement with approval, and after reviewing many other cases, held that mere inadequacy of price to invalidate a contract must *per se* be so excessive as to be demonstrative of fraud.

It seems that it is sufficient to bring a person within the title "purchaser" within the rule, if he gives any valuable consideration in good faith (see the cases of *Thorndike v. Hunt*, 1859, 3 De G. & J. Ch. 563; *Taylor v. Blakelock*, 1886, 32 Ch. D. 560; and *Case v. James*, 1861, 29 Beav. 512, and 3 De G., F. & J. 256).

**Purchase, Words of**—A phrase which usually occurs in the statement of the rule in *Shelley's* case, in contrast with "words of limitation." Words in a deed limiting an estate to the "heirs of X." sometimes operate to confer an estate directly upon the person who is heir of X. at his death, who in that case takes as a purchaser, or by purchase. The words "heirs of X." are then words of purchase.

On the other hand, the words may merely serve to define the quantum of estate taken by X. under the deed, and in that case the words are words of limitation; and the heir of X., if the estate were suffered to descend to him, would take by descent, and not by purchase (see LIMITATION, WORDS OF).

**Purgation of Contempt.**—See CONTEMPT OF COURT.

**Purlieu.**—Purlieu is defined by Manwood as "a certain territory of ground adjoining unto the forest, meered and bounded with immoveable marks, meers, and boundaries known by matter of record only; which territory of ground was once forest-land, and afterwards disafforested by the perambulations made for the severing of the new forests from the old." Purlieus came into existence by means of the *Carta de foresta* granted in the reign of King John, and confirmed by 9 Hen. III. and 25 Edw. I., and many other statutes. "The Statute *Carta de foresta* hath been above thirty



times—and lastly, in 4 Hen. v.—confirmed and enacted, and commanded to be put in execution” (Co. 4 *Inst.* 303). This charter gave permission for the disafforestation of those lands which had been made forests in the reigns of Henry II., Richard I., and John. Purlieus are lands disafforested by perambulations.

The disafforestation did not give a general liberty to any man to hunt in the purlieu, but was made only for the benefit of the owners of the land, for “the king hath a property in beasts escaping out of the forest into the purlieu against every man, but against the owners of the woods and lands in which they are.”

Though wild beasts are out of the forest and in the purlieus, yet the king hath still a property in them (Anno 7 Hen. vi., per Cockeine, J.). A prescription is not good to hunt those beasts which escape out of the forest into the purlieus (13 Hen. vii. fo. 10, placeto 14).

As to the question whether rights of common were destroyed by the disafforestation upon the Statutes of *Carta de foresta*, see *R. v. Rodley*, Hard. 437; *Jenning v. Rocke*, Pal. 93).

[*Authorities.*—Manwood, *Forest Laws*; Co. 4 *Inst.*]

**Purlieu-man.**—A purlieu-man is he that hath free lands within the purlieu to the yearly value of forty shillings per annum (Com. *Dig.*). Those who possessed lands of that value might keep greyhounds there (Co. *Inst.* 303). A purlieu-man finding any wild beasts in his purlieu, may hunt them towards the forest, because he has a property in them *ratione soli*, and if he begins the course in his own lands, he may follow the chase through any man’s grounds whatsoever; but if the beast return towards the forest, he must not forestall him with dogs or any manner of engine whatever (*Assises of Woodstock* (Anno 30 Hen. II.), art. 13). He may hunt and kill, provided he does it without forestalling (Co. 4 *Inst.* 303).

If the beast once recover the *filum forestæ* before the dog fastens, then it is absolutely the king’s or the owner’s of the forest; but if the dog fastens on the deer before it recovers the boundaries thereof, and by the force and strength of the beast is drawn into the forest, and the beast is killed there, the purlieu-man may enter the forest and take and carry away the deer (Manwood).

The following rules are given by Manwood, contrary to which the ancient usage and policy of the forest laws have always prohibited purlieu-men to hunt:—

1. He may not hunt in the night-time (*Assisa de Woodstock*, art. 13).
2. He may not hunt on the Sunday (Dyer, fo. 168, placeto 17).
3. He may not hunt in the FENCE MONTH.
4. He may not hunt oftener than three days in one week.
5. He may not hunt with any more company than his own servants.
6. He may not hunt within forty days next after the king’s general hunting in the forest.
7. He may not hunt within forty days next before the king’s general hunting in the forest.
8. He may not (after notice) hunt in the purlieu, when the forester is serving a warrant near the borders of the purlieu, to hinder him from such service.
9. He may not hunt with any manner of forestalling or other engine to take the deer, neither with gun nor cross-bow, but only by chasing with his dogs.



10. He may not hunt a deer out of season, though it is found in his own purlieu.

[*Authorities*.—Manwood, *Forest Laws*, tit. "Purlieu"; Comyns, *Digest*, tit. "Chase," 1; 3 Cruise, *Digest*, xxvii. 6; Co. 4 *Inst.* 303.]

**Purporting.**—When power is given to do something "purporting" to have a certain effect, it will seem to prevent objections being urged against the validity of the act which might otherwise be raised. Thus where a mortgage deed contained a power of sale to be exercised by the mortgagee after default with a proviso that, upon any sale purporting to be made in pursuance of the power, the purchaser should not be bound to inquire whether default had been made in payment of any principal and interest, or as to the expediency of selling, etc., it was held that a sale which was made under that proviso to a *bonâ fide* purchaser without notice was valid, even though it turned out on balancing accounts that nothing was due to the seller. It was said that the word "purporting" showed that the transaction might really not be a sale at all, that is, that the power would not be really exercisable, yet that the mortgagee should have absolutely vested in him the right to sell so as to give a good title (*Dicker v. Angerstein*, 1876, 3 Ch. D. 600). In the corresponding proviso in the statutory power of sale in the Conveyancing Act, 1881, 44 & 45 Vict. c. 41, s. 21 (2), the phrase is "professed exercise," and not "purporting" (see *Hare v. Copland*, 1862, 13 Ir. Com. L. 426).

**Purprise**, a close or enclosure; as also the whole compass of a manor.

**Pursuance; Pursuant.**—"It is obvious that the provisions in numerous statutes which limit the time and regulate the procedure for legal proceedings for compensation, for acts done in the execution of his office by a justice or other person, or 'under' or 'by virtue' or 'in pursuance' of his authority, do not mean what the words, in their plain and unequivocal sense, convey; since an act done in accordance with law is not actionable, and therefore needs no special statutory exception. Such provisions are obviously intended to protect, under certain circumstances, acts which are not legal or justifiable; and the meaning given to them by a great number of decisions seems, in the result, to be that they give protection in all cases where the defendant did, or neglected what is complained of, under colour of the statute; that is, being within the general purview of it, and with the honest intention of acting as it authorised, though he might be ignorant of the existence of the act; and actually, whether reasonably or not, believing in the existence of such facts or state of things as would, if really existing, have justified his conduct" (Maxwell, 324).

See the following cases:—*Hermann v. Seneschal*, 1862, 32 L. J. C. P. 43; *Roberts v. Orchard*, 1863, 2 H. & C. 769; *Selmes v. Judge*, 1871, L. R. 6 Q. B. 724; *Chamberlain v. King*, 1871, L. R. 6 C. P. 474; *Agnew v. Jobson*, 1877, 47 L. J. M. C. 67; *Hughes v. Buckland*, 1846, 15 Mee. & W. 346; *Lea v. Facey*, 1887, 19 Q. B. D. 352; *Greenway v. Hurd*, 1792, 4 T. R. 553.

The omission to do something which ought to be done in order to the complete performance of a duty imposed on a public body by Act of



Parliament, amounts to "an act done, or intended to be done, in pursuance of the Act," within the meaning of the clause requiring notice of action to be given to the public body (*Wilson v. Halifax*, 1868, 37 L. J. Ex. 44).

"Persons acting in the execution of this Act," sec. 19 of the Special Constables Act, 1 & 2 Will. IV. c. 41, see *Bryson v. Russell*, 1884, 54 L. J. Q. B. 144. See also PUBLIC AUTHORITIES PROTECTION ACT.

**Pursuit.**—The 30th sec. of 1 & 2 Will. IV. c. 32, which makes it an offence to "commit a trespass by entering or being in the daytime upon any land in search of or in pursuit of game," does not apply to a case where the game alleged to be searched for was dead at the time (*Kenyon v. Hart*, 1865, 34 L. J. M. C. 87). A person who, in his own land, shoots a pheasant in the land of another, and goes on such land to pick the bird up, commits a trespass of entering land in pursuit of game within the meaning of the 1 & 2 Will. IV. c. 32, s. 30, the shooting and picking up the bird being one transaction. *Quære*—whether entering land for the purpose of picking up dead game is a trespass within that Act (*Osbond v. Meadows*, 1862, 31 L. J. M. C. 238).

**Pursuivants.**—See HERALDS.

**Purveyance.**—The prerogative of purveyance and pre-emption was a right enjoyed by the Crown of buying up provisions and other necessities, by the intervention of the king's purveyors, for the use of his royal household, at an appraised valuation in preference to all others, and even without the consent of the owner; and also of forcibly impressing the carriages and horses of the subject to do the king's business on the public roads, however inconvenient to the proprietor, upon paying him a settled price. It was a royal right of spoil. By the Statute 12 Cha. II. c. 24, it is provided "that no person, by colour of buying or making provision or purveyance, shall take anything of any subject, without the full and free consent of the owner, obtained without menace of force," etc.

**Purview**—That part of an Act of the Legislature which begins with the words, "Be it enacted," etc., and ends before the repealing clause. According to Cowel, this word also signifies a conditional gift or grant. It is said to be derived from the French *pourvu*, provided. It also implies a condition.

**Put**—An option which a party has of delivering stock at a certain time, in pursuance of a contract, the other party to the contract being bound to take the stock at the price and time therein specified.

*Put* in pleading means to select; to demand: as, "the said J. S. puts himself upon the country"; that is, he selects the trial by jury as the mode of settling the matter in dispute, and does not rely upon an issue in law.

**Putts and Refusals**—A name for time bargains. See GAMING (AND WAGERING), vol. vi. at p. 48.



**Puture**—A custom claimed by foresters, and sometimes by bailiffs of hundreds, to receive victuals for themselves, their servants, horses, and dogs, from those within the perambulation of the forest or hundred, when they might come there.

By 25 Edw. III. st. 5, c. 7 (1351), no forester or keeper of forest or chase, nor any other minister shall make or gather sustenance, nor other gathering of victuals, nor other thing by colour of their office, against any man's will, within their bailiwick or without, but that which is due of old right, that is, those fees which time out of mind they ought to have within that forest, and as shall appear to be due by the oath of twelve regarders.

[*Authority*.—Coke, 4 *Inst.* 307.]

**Pyrotechnic Lights**.—See EXPLOSIVES; FIREWORKS.

**Quærens non invenit plegium**—The plaintiff has not found pledge. The return made by the sheriff to a writ directed to him with this clause, namely, *Si A. fecerit B. securum de clamore suo prosequendo*, etc., when the plaintiff has neglected to find sufficient security.

**Quaker**.—See NONCONFORMIST.

**Qualification**—That which makes any person fit to do a certain act; also abatement, diminution. The circumstance or group of circumstances whereby an individual is rendered eligible for a post is called his qualification, *e.g.* in a case of the directors of public and joint-stock companies, with whom the possession of a prescribed number of shares is usually made the qualification. Any incident annexed to a right, *e.g.* an inherent reciprocal obligation, is also called a qualification of the right.

An annual Act used to be passed indemnifying persons who have omitted to qualify themselves for certain offices and employments, and to extend the time limited for those purposes. See 26 & 27 Vict. c. 107. But now by the 29 Vict. c. 22 it is rendered unnecessary to make and subscribe declarations theretofore required as a qualification for offices and employments.

*The Qualification Act* to kill game (22 & 23 Car. II. c. 25), abolished by 1 & 2 Will. IV. c. 32.

*The Qualification of Justices Act*, 1875 (38 & 39 Vict. c. 54), passed to amend 18 Geo. II. c. 20.

“The same qualification” (6 Vict. c. 18, s. 4) means the same *property* (*Burton v. Gery*, 1847, 17 L. J. C. P. 66). As to qualification for owning British ships, see sec. 1, Merchant Shipping Act, 1894; and as to qualification for medical practitioner on board ship, *ibid.* s. 303.

**Qualified Fee; Qualified Property**.—A BASE FEE (vol. ii. p. 28) is also described as a qualified fee (see also ESTATES, vol. v. pp. 65–72). The interest of the bailee in the bailed goods is described as a qualified or special property (see BAILMENTS, vol. i. p. 451).



**Quality and Quantity of Estate.**—See ESTATES, vol. v. pp. 59–72.

**Quality Marks.**—In *Cox v. Bruce*, 1887, 18 Q. B. D. 147, a bill of lading signed by the captain of a ship in respect of a shipment of bales of jute contained the following provision:—"If quality marks are used, they are to be of the same size as the leading marks and contiguous thereto, and if such quality marks are inserted in the shipping notes, and the goods are accepted by the mate, bills of lading in conformity therewith shall be signed by the captain, and the ship shall be responsible for the correct delivery of the goods." The bill of lading described the bales as marked in proportions specified with different quality marks, indicating different qualities of jute, which marks corresponded with those inserted in the shipping notes made out by the shippers. When the ship was discharged, however, it was found that fewer bales had been shipped marked with one of such quality marks, and more marked with another, indicating an inferior quality than stated in the bill of lading. It was held on the above facts that an indorsee of the bill of lading for value, without notice of the incorrectness of the description of the marks, had no right of action against the shipowners, either for breach of contract, or upon the ground that they were estopped by the representation contained in the bill of lading (*Grant v. Norway*, 1851, 10 C. B. 665, followed).

**Quamdiu se bene gesserit.**—See OFFICE.

**Quantities.**—Quantities or bills of quantities are statements of the quantities of work and materials required to be done and provided in the execution of building and engineering works.

"A bill of quantities is in the form of an estimate, giving in detail the quantity of each item of labour and materials, with a money column left in blank for the builder to fill in the prices. A bill of quantities usually contains several bills, such as the 'carpenter's' bill, the 'mason's' bill, and so on; the total sum of the addition of each bill being carried to a summary, and the addition of the sums in the summary makes the total estimate" (*Hudson on Building Contracts*, 2nd ed., p. 95).

Bills of quantities may be made out and calculated by the builder or contractor himself, or they may be supplied to him either by the architect or engineer, or by a quantity surveyor, that is to say, by a professional man whose almost exclusive occupation is the preparation of bills of quantities, and the measuring up of deviations from the contract, or from the bills of quantities, on the completion of the works.

These bills of quantities are generally lithographed, and a copy is sent to each builder who applies for them, or who is invited to tender for the building or engineering work.

The necessity for thus supplying builders with quantities arises from the fact that builders will not often tender without being furnished with them. The builder has not time to prepare them himself, for the amount of labour involved in their preparation is enormous, while the method of checking, to avoid the chance of mistakes, is elaborate. The expense also would be a very large item; for if a builder in a large way of business were required to *take out* (as it is called) his own quantities, he would have to



keep in his employ a staff of experienced clerks, whose labour would be thrown away in the case of every tender not accepted.

These considerations, and the rapidity with which tenders have to be prepared and sent in, gave rise to the present system of taking out quantities, and the way in which the quantity surveyor is paid for his services is curious:—

At the end of the bill of quantities, after the total sum at which the builder is willing to do the work is arrived at, there is generally inserted a note saying “add to the above sum  $1\frac{1}{2}$  (2, or maybe  $2\frac{1}{2}$ ) per cent. for quantity surveyor’s charges,” and a further note follows: “add the sum of £ , for lithographer’s charges. The above sums to be paid to the quantity surveyor by the accepted contractor out of the first instalment received by him under the contract.”

These two amounts are added to the above total, and the ultimate total becomes the amount of the builder’s tender.

The quantity surveyor should therefore, if the building owner obtains a tender and enters into a contract, receive payment from the builder, but the course is not always so simple, and then difficulties arise.

The tenders may come out too high, and the building owner refuse to go on with the works, or he may change his mind, and then there is no builder to pay the quantity surveyor.

Who is then liable to pay the quantity surveyor depends entirely upon the nature of his employment: upon whether he was employed by the architect or the building owner; and if by the architect, upon the extent of his authority.

There is an established custom that an architect who has instructions to get tenders, has implied authority to employ a quantity surveyor; but whether his implied authority would extend to employing himself to take out quantities, and to getting payment from the builder, has not yet been decided; and there does not appear to be any decision as to whether the implied authority would render the employer liable to the quantity surveyor in cases where the architect has himself exceeded his authority by designing a more expensive building than was justified by instructions.

Another source of litigation has arisen in the case of mistakes in the preparation of quantities by quantity surveyors. It was for some time contended that the quantity surveyor who was paid by the builder was liable to him for mistakes in the quantities and negligence; but if the quantity surveyor is employed by the architect in the customary way, he owes no duty to the builder, and is not liable to him for negligence.

The only cases in which the quantity surveyor is liable to the builder are those in which he has been directly employed by him.

[*Authority*.—Hudson, *Building Contracts*, 2nd ed.]

**Quantum meruit.**—1. Where work has been done by the plaintiff for the defendant under a contract, express or implied, that it shall be paid for (see *Harrison v. James*, 1862, 7 H. & N. 804), or upon the defendant’s request, from which such a contract would be implied by law, but the price of the work has not been agreed upon, the plaintiff can recover its reasonable value (*quantum meruit*) from the defendant.

2. *Rule*.—But if the work has been done under a special contract which remains open, no action will lie for a *quantum meruit* (Smith’s *Leading Cases*, notes to *Cutter v. Powell*). This means that if the completion of the



special contract is a condition precedent (see *CONDITIONS*, vol. iii. p. 250) to the payment for the work, then, subject to the exceptions stated below, nothing need be paid till the completion is effected. In the leading case (*Cutter v. Powell*, 1795, 6 T. R. 320; 3 R. R. 185) the mate of a vessel was to be paid a sum for which a promissory note was given, provided that he finished the voyage. As he died before reaching port, nothing was recoverable by his representatives. See also *Sinclair v. Bowles*, 1829, 9 Barn. & Cress. 92; 22 R. R. 589; *Metcalfe v. Britannia Iron Works Co.*, 1877, 1 Q. B. D. 613; 2 Q. B. D. 423. So in *Appleby v. Myers* (1867, L. R. 2 C. P. 651), where the contract was to do work and supply materials upon certain premises for a specific sum to be paid on completion of the work, and the premises were burnt down before completion, it was held that nothing was payable for the work actually done or the materials supplied.

No contract would be construed to make completion thus conditional, unless both the whole work to be done and the price to be paid were specified by it (*Roberts v. Havelock*, 1832, 3 Barn. & Adol. 404).

Work done by a commission agent in negotiating a bargain is, by custom, only to be paid for if a bargain is effected (*Read v. Rann*, 1830, 10 Barn. & Cress. 438; *Simpson v. Lamb*, 1836, 17 C. B. 603), unless this consummation is prevented by the defendant's own conduct.

The claim for *extras* on a building contract where the contract does not, as is usually the case, provide a scale of payment for them, is a common illustration of a *quantum meruit* (*Brixton v. Cornish*, 1844, 12 Mee. & W. 426). The contract must be proved to show what are extras.

3. *First Exception* to the above rule (2). When something has been done under a special contract which remains open, but not done in accordance with the contract, and the other party has accepted the benefit of the work, its value may be recovered (*B. N. P.* 139 a; *Burn v. Miller*, 1813, 4 Taun. 745; 14 R. R. 655; *Smith's Leading Cases*, *ubi supra*). So also where the defendant has invited or encouraged the plaintiff to proceed after performance of the special contract has become impossible (*Burn v. Miller*, *supra*). The reason of this exemption is that the other party has agreed to the substituted performance by taking the benefit of it. Accordingly it must be shown that it has been useful to him (*Simpson v. Lamb*, *supra*), and that he could have rejected it (*Munro v. Butt*, 1859, 8 El. & Bl. 738). No inference of acceptance can be drawn from the fact that the defendant has held possession of his own house upon which the plaintiff did the work.

4. *Second Exception* to the above rule (2). Where the other party has refused to perform (*Planché v. Colburn*, 1831, 8 Bing. 14; 34 R. R. 613), or has incapacitated himself from performing (*Inchbald v. Western Neilgherry Coffee Co.*, 1864, 17 C. B. N. S. 733; *Robson v. Drummond*, 1831, 2 Barn. & Adol. 303; *Keys v. Harwood*, 1846, 2 C. B. 905) his part of the contract, he may be sued on a *quantum meruit* for the work which the plaintiff has done immediately (*Hochster v. De la Tour*, 1853, 2 El. & Bl. 678; *Frost v. Knight*, 1872, L. R. 7 Ex. 111). The refusal must be unqualified and final (*Ehrensperger v. Anderson*, 1848, 3 Ex. Rep. 158; *Johnstone v. Milling*, 1886, 16 Q. B. D. 460), and must be treated by the plaintiff as a remission of the contract (*loc. cit.*; *Danube, etc., Rwy. Co. v. Xenos*, 1861, 11 C. B. N. S. 152; 13 *ibid.* 825; *Avery v. Bowden*, 1855, 5 El. & Bl. 714; 6 *ibid.* 953). A mere statement by a lessee that he will not have money enough to carry out a contract to build at a distant day, is not such a final refusal (*Johnstone v. Milling*, *supra*). The refusal, etc., must affect a material part of the contract. The question always is whether the acts and conduct of the party in default



evinced an intention no longer to be bound by the contract (*Mersey Steel and Iron Co. v. Naylor*, 1882, 9 Q. B. D. 648; 9 App. Cas. 434).

5. If the part of the contract which is left unperformed by the plaintiff cannot legally be performed, he may sue on a *quantum meruit* (*Clay v. Yates*, 1856, 1 H. & N. 73). Where goods were sold on Sunday contrary to the Lord's Day Act (29 Cha. II. c. 7), and the defendant took and retained possession of them, an action on a *quantum meruit* was sustained (*Williams v. Paul*, 1830, 6 Bing. 653; 31 R. R. 513).

[*Authority*.—Smith's *Leading Cases*, notes to *Cutter v. Powell*.]

**Quarantine.**—The strict enforcement of vexatious quarantine regulations, such as still prevail in many other countries, has in this country not been practised recently. The law, however, has always sanctioned restrictions on the landing in our ports of persons or goods likely to convey infection; and still does so, though the conditions under which they may be enforced have of late been considerably modified.

All previously existing statutes were repealed and consolidated in the year 1825 (6 Geo. IV. c. 78). By it all vessels coming from, or having touched at, any place from whence the Privy Council should have declared it probable that the plague or other infectious disease or distemper, highly dangerous to the health of His Majesty's subjects, might be brought, and all persons, goods, wares and merchandise, packets, packages, baggage, wearing apparel, books, letters, or other articles on board such vessels, were declared liable to quarantine, and on arrival at any port or place in the United Kingdom might be obliged to perform quarantine in such place or places, for such time and in such manner, as should from time to time be directed by Order in Council, notified by proclamation or published in the *London Gazette*. This was extended in 1866 so as to include every vessel having on board any person affected with a dangerous or infectious disorder, whether she had come from abroad or not. The importation of any sort of goods or merchandise especially liable to retain infection might also be subjected to such regulations and restrictions as should be imposed by Order in Council, although they did not come direct from any infected country. The Act provided elaborate machinery for obliging masters of vessels to give notice when they had infection on board, and for enabling the customs authorities to inquire into all suspected cases; and, further, imposed heavy penalties on breaches of the regulations, including a summary power of arresting persons who should escape from quarantine.

Further powers were conferred by subsequent Acts, which were afterwards repealed and codified by the Public Health Act, 1875. It, by sec. 130, gives power to the Local Government Board from time to time to make, alter, and revoke regulations with a view to the treatment of persons affected with cholera or other epidemic, endemic, or infectious disease, and to preventing the spread of such diseases, as well on the seas, rivers, and waters of the United Kingdom, and on the high seas within three miles of its coasts, as on land; such regulations are to be published in the *London Gazette*. And by sec. 134, whenever any part of England appears to be threatened with or is affected by any formidable epidemic, endemic, or infectious disease, the Board may make special regulations for guarding against the spread of disease, and may by order declare all or any of the regulations so made to be in force within the whole or any part of the district of any sanitary authority, and to apply to any vessels, whether on inland waters or on arms or parts of the sea, within the jurisdiction of the Lord High Admiral, for such period as



they name. The sanitary authority of the district in which such regulations are declared to be in force must superintend and see to their execution, and appoint and pay such medical or other officers or persons, and do and provide all such acts, matters, and things as may be necessary for mitigating any such disease, or executing such regulations (s. 136). They and their officers have for this purpose power of entry on any premises or vessel (s. 137).

Any person who (*a*) wilfully violates any regulation so issued by the Local Government Board, or (*b*) wilfully obstructs any person acting under the authority or in the execution of such regulation, is liable to a penalty not exceeding £5 (s. 140).

The above sections were applied to London by Sched. I of the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76); and it was further enacted by sec. 85 that the Metropolitan Asylums Managers shall, for the purpose of the epidemic regulations, have such powers and duties of a sanitary authority as shall be assigned to them by the Local Government Board.

The Customs Laws Consolidation Act, 1876 (39 & 40 Vict. c. 36, s. 234), further empowered the Privy Council by order to require that no person coming from or having touched at any place abroad, where they had reason to believe that yellow fever or other highly infectious distemper prevailed, should quit the vessel before the state of health of the persons on board should have been ascertained on examination by the proper officer appointed for the purpose by the Commissioners of Customs, and before permission to land should have been given by such officer. In 1896 this power to make orders was transferred from the Privy Council to the Local Government Board, but the section otherwise remains in force. The penalty for landing without proper permission is £100, recoverable summarily before justices.

In 1889 it was declared that regulations made under sec. 130 of the Act of 1875, or sec. 52 of the Act of 1866, might provide for such regulations being enforced and executed by the officers of customs as well as by other authorities (52 & 53 Vict. c. 64, s. 2). This Act and the original Act of 1825 and portions of other Acts were repealed in 1896, and the law put on a simpler footing, by the Public Health Act of that year (59 & 60 Vict. c. 19), which specifies the matters to be provided for by these regulations. With the consent of the Commissioners of Customs, the Admiralty, and the Board of Trade respectively, they may provide for their being enforced and executed by the officers of customs, and the officers and men employed in the coastguard, as well as by other authorities; and may, among other things, provide for (*a*) signals to be hoisted by vessels having any infectious case on board, (*b*) questions to be answered by masters of vessels and others as to cases of disease on board, (*c*) the detention of vessels or persons, and (*d*) the duties to be performed in case of such disease by masters, pilots, and other persons on board vessels. Any person who wilfully neglects, or refuses to obey or carry out, or obstructs the execution of, any such regulation, is liable to a penalty of £100, and to a continuing penalty of £50 for every day during which the offence continues. These penalties, if not recovered summarily under the provisions of the Acts relating to Public Health, are recoverable by action on behalf of the Crown in the High Court.

Regulations as to cholera, repealing those previously in force, were made on the 28th of August 1890. Under them, Custom House officers are to detain any ship which they suspect to be infected with cholera, until it can be examined by the medical officer of health. Such officer can examine any ship he suspects, whether detained by the customs or not; and if he finds her to be infected, can detain her and any infected or filthy persons who are on board. All infected articles and clothing are to be disinfected



or destroyed, and the ship is to be disinfected according to the directions of the medical officer. Persons dying of cholera on board a ship so detained are to be buried at sea, or elsewhere as the local authority may direct. Every ship infected with cholera is to fly a distinguishing flag. This order was amended 6th September 1892, and is still in force.

Orders have also been made from time to time prohibiting the importation of rags or dirty bedding or clothing into this country from places where cholera prevails. The last was published 5th August 1893, and amended 13th September 1893. Special regulations are also made from time to time for particular ports. As the Act of 1896 merely re-enacted previously existing laws, empowering the Local Government Board to make regulations, it has not apparently been thought necessary to reissue or vary the orders in force before it came into operation.

See also EPIDEMIC ; INFECTIOUS DISEASES ; PUBLIC HEALTH.

**Quarantine, Right of.**—See HUSBAND AND WIFE, vol. vi. p. 257.

**Quare impedit.**—“*Quare impedit* is an ancient writ which lies by him who, being in possession of an advowson of a church, is disturbed in his presentation to it” (2 *Inst.* 35 *b*; Comyns, *Digest*). It was the old real action in respect of disturbance of patronage, *i.e.* the interference with a patron in his right of presentation. The writ of *quare impedit* was abolished by the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126), s. 26, which enacted that no *quare impedit* should be brought after the commencement of the Act in any Court whatsoever; but that where any such writ would lie, either in a superior or in any other Court, an action might be commenced by writ of summons issuing out of the Court of Common Pleas in the same manner and form as a writ of summons in an ordinary action. See Appendix A. of the Appendices to the Rules of the Supreme Court, 1883, for form of indorsement of writ claiming *quare impedit*.

*Quare impedit* may be brought in the case of a hospital as well as a church. The old writ directed the sheriff to command the defendant or defendants to permit the plaintiff to present a fit person to the vacant church claimed to be in the plaintiff's gift, and, failing such permission, to appear on the stated day to show why they hindered the plaintiff (*quare impedit*). If the plaintiff had reason to think that the bishop was likely to admit a clerk other than his own nominee, he could issue the writ of *ne admittas* to prohibit his so doing, and, if successful in his suit, could not only remove the incumbent and recover the presentation, but also obtain damages in respect of the injury done him by incumbering the church with a clerk (3 Blackstone, 248).

The patron, not the clerk, is the proper plaintiff to the action, and the plaintiff must show a title to the presentation in himself or the person under whom he claims, and prove that he or they have made an actual presentation to the living. He must also prove the disturbance. The admission and institution of a clerk upon the presentation of an alleged patron, or the refusal to admit the plaintiff's nominee, is a disturbance. The bishop and clerk usually disclaim any title, leaving the plaintiff to prove his own, or they may plead *ne disturba pas*, thereby entitling the plaintiff to judgment and recovery of his presentation. If the plaintiff seeks damages, an inquiry must be made as to four points, *viz.*—(1) Is the church full? (2) Who made the presentation? (3) What is the yearly value of the church?



(4) What time has elapsed since the church was void? There was no right at common law to damages for the disturbance, but the Statute of Westminster the Second (13 Edw. I. c. 5) enacts that if more than six calendar months have passed by reason of the disturbance of any person, so that the bishop confers to the church, and the true patron has lost his presentation for that time, damages should be awarded to the amount of two years' value of the church. And if the six months be not passed, then the damages shall be equal to a half-year's value of the church (s. 3). If the church is void, no damages are given.

The Statute 4 & 5 Will. IV. c. 49 expressly gives costs in actions of *quare impedit*, the defendants in such actions previously to the Act not being liable for the payment of costs; and enacts that in all such actions where a verdict is given for the plaintiff or plaintiffs, he or they shall, in addition to the damages to which he or they is or are by law entitled, also have judgment to recover the full costs and charges to be assessed, taxed, and levied in the usual way; and where, on the other hand, the plaintiff or plaintiffs shall discontinue or be nonsuited, or a verdict shall be had against him or them, then the defendant shall take judgment to recover full costs and charges against the plaintiff or plaintiffs, to be taxed and levied as aforesaid. But the Act expressly provides that no judgment for costs shall be had against any archbishop, bishop, or other ecclesiastical patron or incumbent, if the judge who shall try the cause, or if there shall be no trial by a jury, the Court in which judgment shall be given, shall certify that such archbishop, bishop, or other ecclesiastical patron or incumbent had probable cause for defending such action; but in no case when the defence to any such action shall be grounded upon a presentation or presentations, collation or collations previously made to any benefice, shall such presentation or presentations, collation or collations, be deemed or considered probable cause for defending such action.

As between patrons with alternate turns of presentation to a benefice, a presentation on an exchange of livings must be reckoned as a turn; and if one patron wrongfully usurp the turn of another, the order of turns is not thereby altered, but the ousted patron (after six months) loses his turn, and cannot requite himself by usurping against the wrong-doer by way of retaliation; and it makes no difference whether the usurper be a total stranger or a person privy in, or party to, the title (*e.g.* coparceners) (*Keen v. Denny*, [1894] 3 Ch. 169).

See ADVOWSON; ECCLESIASTICAL LAW.

**Quare non admisit**—A writ directed against a bishop refusing to admit the plaintiff's clerk. For a modern example of such an action, see *Heywood v. Bishop of Manchester* (1884, 12 Q. B. D. 404).

**Quarrel**.—See CHANCE MEDLEY; MANSLAUGHTER.

**Quarries**.—The law as to quarries has been fully treated under MINES AND MINERALS, vol. viii. at pp. 402, 404, etc.

**Quarter-days**.—These are CHRISTMAS DAY; LADY DAY; MID-SUMMER DAY; MICHAELMAS.



**Quartering.**—See BILLETING.

**Quarterlands.**—See MAN, ISLE OF, vol. viii. at p. 116.

**Quarter-Rating**—The rating on only one-fourth part of the net annual value—a privilege enjoyed by owners of railways and other kinds of property, as mentioned in sec. 211 of the P. H. Act, 1875—extended to allotments by the Allotments Rating Exemption Act, 1891 (54 & 55 Vict. c. 33). By that Act “allotment” means any parcel of land of not more than two acres in extent, and let as an allotment and cultivated as a garden or a farm, or partly as a garden and partly as a farm.

## Quarter Sessions.

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INTRODUCTION.—On the institution of the county COMMISSION OF THE PEACE it was directed that the JUSTICES should hold their sessions thereunder at least four times a year, from which arose the description of such sittings as Quarter Sessions. A distinction has been drawn between General Sessions of the peace and Quarter Sessions of the peace by certain authors, statutes, and cases, but is now of minor and technical importance (Archbold, *Quarter Sessions*, 5th ed., 1). In certain cases ridings, parts, or divisions or liberties of counties have separate commissions of the peace and Courts of Quarter Sessions (52 & 53 Vict. c. 63, s. 13 (14)). So long as borough justices sat under charter or prescription, and not under a commission of the peace, their sittings were usually described as General Sessions; but now such boroughs have Quarter Sessions (see INFERIOR COURTS). In the county and city of London certain local differences still exist (see LONDON CITY; LONDON COUNTY).

The Court is an inferior Court of record having power to imprison for contempt committed *in facie curiæ* (*In re Porter*, 1864, 33 L. J. M. C. 142; *R. v. Lefroy*, 1873, L. R. 8 Q. B. 134). It is also a continuing Court, with power to adjourn cases or respite judgments (*Keen v. R.*, 1847, 10 Q. B. 928), and to summon juries for adjourned sittings (1 & 2 Vict. c. 4); but where the power of adjournment is not exercised a subsequent Quarter Sessions cannot deal with orders of a previous Court (*Midland Rwy. Co. v. Edmonton Guardians*, [1895] 1 Q. B. 357; [1895] App. Cas. 485).

The Acts creating the commission of the peace required the sessions to be held quarterly at the least (36 Edw. III. st. 1, c. 12; 12 Rich. II. c. 10; 2 Hen. v. st. 1, c. 4).

On the change from old to new style, the times for holding were fixed on the first week after 11th October, the first week after 28th December, the first week after 31st March, and the first week after 24th June (11 Geo. IV. and 1 Will. IV. c. 70, s. 35). In 1834 (4 & 5 Will. IV. c. 47) the justices at the January sessions were allowed to fix the spring sessions not earlier than 7th March nor later than 22nd April, so as to avoid clashing with the spring assizes, and in 1894 (57 Vict. c. 6) the justices at general Quarter Sessions, or any adjournment or special meeting, may fix the next subsequent sessions so as not to clash with the next assizes, provided that they must not be held over fourteen days before or after the week in which they would otherwise be held.

These provisions only vary the mode of complying with the original statutory minimum of annual sessions at regular intervals, and do not affect the power of the justices to hold general sessions under the commission as often as they find desirable (*Busby v. Watson*, 1776, 2 Black. W. 1050).

These provisions do not apply to borough Quarter Sessions, which are held once in every quarter at times fixed by the recorder, who may also hold other sessions if he thinks fit, or as directed by the Secretary of State (see INFERIOR COURTS, vol. vi. p. 427). Nor do they apply to the County of London, where sessions are regulated by a scheme approved in 1892 and by an Act of 1896 (59 & 60 Vict. c. 55; see LONDON COUNTY).



County sessions are summoned by a precept signed by two justices, and issued to the sheriff to summon jurors, coroners, gaolers, and constables, and to proclaim the sessions. It is issued at least nineteen days before the day fixed for sessions; the advertisements are now usually issued by the clerk of the peace.

The Court consists of all the justices in the commission. There are now no justices of the quorum, but two justices must be present to constitute and adjourn the Court. Justices of the High Court are named in the commission, but not required to attend (12 Rich. II. c. 10). If the business at county sessions requires it, two Courts may be constituted, each before at least two justices, and such business as the justices present think fit may be assigned to the second Court, for which the clerk of the peace appoints a deputy (21 & 22 Vict. c. 73, s. 9).

County justices appoint a chairman and vice-chairman, who usually preside in the first and second Courts. They direct grand juries, sum up to petty juries, and give the judgment of the Court, but are not sole judges and have not a casting vote, so that on an equal division of votes an appeal fails (*R. v. Fladbury*, 1840, 10 Ad. & E. 706).

Borough sessions are summoned by a precept issued to the clerk of the peace by the recorder (45 & 46 Vict. c. 50, s. 186). The borough justices attend the Court, but the recorder, or his duly appointed deputy, is sole judge. The mayor may, however, adjourn the Court in his absence (45 & 46 Vict. c. 50, s. 167). These sessions are dealt with under INFERIOR COURTS, vol. vi. at p. 427).

The clerk of the peace is the clerk and principal officer of the Court (see PEACE, CLERK OF).

The right of counsel to exclusive audience at Quarter Sessions varies with the county, but the usual practice is to concede it where at least four counsel attend. But solicitors have audience at certain Courts (Archbold, *Quarter Sessions*, 5th ed., 127).

At common law a corporation could neither prosecute nor defend at Quarter Sessions; and when a corporation is there indicted it is still necessary to remove the case by *certiorari* into the High Court. The limitation as to prosecution is now inoperative (Archbold, *Quarter Sessions*, 5th ed., 278).

JUDICIAL FUNCTIONS. — (a) *Original Jurisdiction—Criminal.* — On its original constitution the Court is said to have been able to try any offence except forgery and perjury (Archbold, *Quarter Sessions*, 5th ed., 42). This jurisdiction rested on the old commission and the Acts 18 Edw. III. st. 2, c. 2; 34 Edw. III. c. 1; 12 Rich. II. c. 10. The Court may now try at its Quarter Sessions, or any adjournment thereof, or at General Sessions an indictment for any offence committed within, or justiciable within the county, with the following exceptions created, except where otherwise indicated, by 5 & 6 Vict. c. 38:—

1. Treason and misprison of treason, treason felony.
2. Offences against the queen's title, prerogative, person, or Government, or against either house of Parliament, and composing, printing, or publishing seditious libels.
3. Offences subject to the penalties of PRÆMUNIRE.
4. Murder and any capital felony.
5. Felonies punishable by penal servitude for life on a first conviction. But burglary is now triable at Quarter Sessions (59 & 60 Vict. c. 57).
6. Blasphemy and offences against religion, and composing, printing, or publishing blasphemous libels.
7. Administering or taking unlawful oaths.
8. Perjury and subornation of perjury, or making or suborning any other person to make a false oath, affirmation, or declaration, punishable as perjury or as a misdemeanour. The common law offence never was, but the offences under 5 Eliz. c. 9, were cognisable at Quarter Sessions.
9. Forgery.
10. False personation (37 & 38 Vict. c. 36).
11. Bribery, undue influence, or corrupt practices at elections (17 & 18 Vict. c. 102; 46 & 47 Vict. c. 51, s. 53; 47 & 48 Vict. c. 70).
12. Bigamy and offences against the marriage laws.
13. Abduction of women and girls, and indictable offences against the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69).
14. Endeavouring to conceal the birth of a child (see BIRTH, CONCEALMENT OF).
15. Stealing or fraudulently taking or injuring or destroying records or documents belonging to a Court of law or equity, or relating to proceedings therein (see 24 & 25 Vict. c. 96, s. 30).



16. Stealing or fraudulently destroying or concealing wills or testamentary papers or documents of title to lands (24 & 25 Vict. c. 96, ss. 28, 29).

17. Offences against the Factor sections of the Larceny Act, 1861 (24 & 25 Vict. c. 96, ss. 75-87; see EMBEZZLEMENT).

18. Poaching at night by bodies of armed men (9 Geo. IV. c. 69, s. 9).

19. Unlawful combinations or conspiracies to commit an offence which the justices could not try if committed by one person.

20. Rural incendiarism (see ARSON).

Offences by debtors have since 1869 (32 & 33 Vict. c. 62, s. 10) been cognisable at Quarter Sessions. The limits on costs within the central Criminal Court districts which existed for some time was abolished in 1851 (14 & 15 Vict. c. 55, s. 13).

The inability to try the offence does not preclude the grand jury from finding a true bill for any of these offences; but if they do, the Court must remit the indictment and enlarge the recognisances to the next assizes for the county (see 5 & 6 Vict. c. 38, ss. 2, 3).

The jurisdiction to try does not compel the Court to try; for in cases of doubt or gravity it is competent to adopt the course above stated—a practice authorised by the commission of the peace.

The procedure of Courts of Quarter Sessions on trial of indictments is the same as in a Court of Assize (see INDICTMENT; PROSECUTION).

Its power as to restoration of stolen property, or compensation to innocent purchasers thereof by felony is also the same as that of a Court of Assize (see STOLEN GOODS), and as to compensation of persons injured; but its power to grant rewards to persons active in apprehending offenders is limited to £5 to any one person (7 Geo. IV. c. 64, ss. 28-30; 14 & 15 Vict. c. 55, s. 8). As to costs of prosecution on indictment, see COSTS *in Criminal Cases*.

Where incorrigible rogues are sent to Quarter Sessions for punishment the Court may allow costs, though there is no indictment (9 Geo. IV. c. 83, s. 9; Simey, *Quarter Sessions*, p. 79).

The sentence of a Court of Quarter Sessions runs from the day when it is pronounced, unless otherwise ordered (21 & 22 Vict. c. 73, s. 12).

*Original Jurisdiction—Civil.*—The civil jurisdiction, such as it is, of Quarter Sessions, does not arise from the commission of the peace, and is wholly statutory. The large jurisdiction which the Court had for administrative purposes has almost entirely been transferred to the COUNTY COUNCIL. What remains relates to the following subjects:—

1. *Clergy.*—Under the Clergy Discipline Act, 1892, the Court elects triennially five justices as part of the panel of assessors for trying criminal clerks.

2. *Highways.*—Orders for diverting and closing highways are enrolled at Quarter Sessions on the certificate of the justices who have viewed the way (5 & 6 Will. IV. c. 50, ss. 85-91; see HIGHWAYS). Where such orders are appealed against, the Court determine the appeal with a jury.

3. *Licensing.*—The county licensing committee, appointed annually by Quarter Sessions for justices not disqualified by interest, has the confirmation of all grants of new licences except off-licences (see LICENSING).

4. *Lunatics.*—The Court at Michaelmas sessions selects under secs. 9, 10 of the Lunacy Act, 1890, justices to exercise the judicial authority under the Act as to lunatics; and under sec. 177, three or more justices and one or more medical practitioners to visit all houses in the district licensed for lunatics.

They are also outside London the authority for licensing houses for the reception of lunatics (ss. 207-221; see ASYLUMS).



5. *Police*.—The Court has full power to make representations as to the conduct or efficiency of the police; but the direct management in counties has been, since 1889, transferred to the standing joint-committee, composed half of justices elected annually by the Court, and half of county councillors, also elected annually by the council (see POLICE, COUNTY).

6. *Prisons*.—Under the Prisons Act, 1877, s. 13, the Court appoints a visiting committee consisting of justices, subject to rules of the Secretary of State. The orders up to 1893 are listed in the Index to Statutory Rules and Orders, and since that date are listed in the annual volumes of Statutory Rules and Orders.

(b) *Appellate Jurisdiction*.—The Court is said to have all the powers given to one or more justices out of session; but this is limited to cases where the powers are not expressly made exercisable by the justices of a particular division.

There is no general statute giving an appeal to Quarter Sessions from all determinations of Courts of Summary Jurisdiction, except sec. 19 of the Summary Jurisdiction Act, 1879, which gives appeals from any conviction ordering imprisonment for an offence without the option of a fine, under any Act except that of 1879, or imprisonment for doing or failing to do any thing except comply with an order to pay money, or find sureties, or enter into a recognisance, or give any security. The right to appeal does not exist where the appellant has pleaded guilty, or has elected to be tried summarily for an indictable offence (*Ex parte Lambert*, [1892] 1 Q. B. 664).

In other cases reference must be had to the particular statute, if any, authorising an appeal.

Except under certain Revenue Acts there is no appeal to Quarter Sessions from the dismissal of an information or complaint (*Payne v. Uxbridge Justices*, 1881, 45 J. P. 327, 420; *R. v. Glynne*, 1872, L. R. 7 Q. B. 25; *R. v. May*, 1880, 5 Q. B. D. 384). The other appellate powers of the Court, which are too many to be here given in detail, are collected in Archbold, *Quarter Sessions*, 5th ed., p. 586.

The most important are the following:—

1. *Bastardy Appeals* (8 & 9 Vict. c. 10; 35 & 36 Vict. c. 65).—See BASTARDY.

2. *Rating Appeals*.—(1) An appeal lies against the basis of the county rate or the rate itself. The procedure is regulated by the County Rates Act, 1852, as modified by the High Constables Act, 1869, and the Local Government Act, 1894. See RATING.

(2) An appeal also lies against a poor rate under the Poor Law Acts, after the assessment committee has refused relief (27 & 28 Vict. c. 39, s. 1), and by the assessment committee against decisions of special sessions (*R. v. Montgomery Justices*, 1881, 50 L. J. M. C. 52). An appeal lies against distress warrants for non-payment of rates, but not where the ground of appeal was one which could be taken on appeal against the rate (*R. v. Kent Justices*, 1867, 16 L. T. 672).

(3) An appeal also lies against a highway rate by any person aggrieved thereby (5 & 6 Will. IV. c. 50, s. 105; 6 & 7 Will. IV. c. 96).

3. Appeals with reference to lunatic and other paupers raising questions of settlement or domicile for purposes of the poor law (11 & 12 Vict. c. 43, s. 35). See ASYLUMS; POOR LAW.

4. Appeals with reference to the grant or refusal of licences for intoxicants. See LICENSING, vol. vii. at p. 404.

There is also subsidiary appellate jurisdiction.



5. As to orders of justices for stopping up or diverting a highway, see HIGHWAYS.

6. As to determinations under the General Inclosure Acts of 1801 (41 Geo. III. c. 109, s. 3) and 1836 (6 & 7 Will. IV. c. 115, s. 33), and certain local and special Inclosure Acts, the appeal must be within six months of the determination by which the appellant is aggrieved (6 & 7 Will. IV. c. 115, s. 33), or such other time as is named by the special Act (*Beaufort (Duke of) v. Neeld*, 1845, 12 Cl. & Fin. 248).

PROCEDURE.—The appeal is, as a general rule, to the next practicable sessions after the order appealed from is made.

What are the next practicable sessions is a question of fact to be determined by inquiring what are the earliest sessions by which the proper notices can be given and the necessary preliminary steps completed (*Ryde, Rating Appeals*).

The jurisdiction of the Court on the appeal is to rehear the case, the respondent proving it afresh, and to review the decision of the justices appealed from on questions of fact and law, to consider the validity or form of the conviction, and even, if on all these things they agree with the justices below, to allow the appeal or vary the order below, on the ground that the sentence is excessive (*R. v. Surrey Justices*, [1892] 2 Q. B. 719).

Subject to the special rules made by each Court of Quarter Sessions, if *intra vires* (*R. v. Bird*, 1898, 14 T. L. R. 384), the procedure as to appeals from convictions or orders made pursuant to the Summary Jurisdiction Acts is as follows.

The appeal must be to the Court prescribed by some particular act, or if none is prescribed, to the next practicable Court of General or Quarter Sessions for the county, borough, or place for which the Court of summary jurisdiction acted, *i.e.* in the case of a county having one commission of the peace, but two divisions, such as Suffolk, Herts (37 & 38 Vict. c. 45), and Sussex (28 & 29 Vict. c. 37), to the Court held for the division for which the petty sessions acted.

Where the order appealed from is that of a Court of summary jurisdiction, the procedure on appeal is regulated by the Summary Jurisdiction Acts of 1879 and 1884, and this procedure applies to Bastardy Appeals.

Appeals with reference to liquor licences, other than against convictions for offences, are regulated by the provisions of those Acts (*In re Boulter*, [1897] App. Cas. 556).

And all appeals, except when otherwise expressly provided, are subject to Baines' Act (12 & 13 Vict. c. 45, s. 1), and require fourteen clear days' notice of appeal, except on the appeals specified in sec. 2, which are now governed by the Summary Jurisdiction Act, 1879, or the special Act governing the appeal.

The Court is empowered to disregard technicalities, to give costs, and to amend unimportant defects in the order appealed from, and to supplement defective recognisances. Its decisions on appeal are final, unless obviously without jurisdiction, in which case they are reviewable by *certiorari* (s. 9).

The Court has power to state a special case for the High Court on most appeals (s. 11), and may also, in the case of orders, rates, and like matters, submit the subject of the appeal to arbitration (ss. 12–14).

Fines, issues, amerciaments, and forfeited recognisances are levied under 3 Geo. IV. c. 46 (see 12 & 13 Vict. c. 45, s. 17, and ESTREATS; FINE).

Orders of the Court on appeals may be removed by *certiorari* to the High Court for enforcement (12 & 13 Vict. c. 45, s. 18).



*Review of Decisions of the Court.*—The decisions of a Court of Quarter Sessions are not reviewable in the High Court by way of APPEAL.

In the case of an indictment the mode of review is by writ of ERROR; but the Court may also in its discretion act under 11 & 12 Vict. c. 78 (see CROWN CASES RESERVED). The writ of CERTIORARI is not used to review the decisions of Quarter Sessions on indictment, except as ancillary to a writ of error (see ERROR, WRIT OF), but is used to remove the trial of an indictment into the High Court, or to the Central Criminal Court, where the nature or circumstances of the charge render that course expedient in the interests of justice.

Decisions of Courts of Quarter Sessions on appeal from justices in petty or special sessions, etc., are reviewable by CERTIORARI, only if given without jurisdiction. But the Court in its discretion may state a special case for the opinion of the High Court, but cannot be compelled to do so by MANDAMUS. Costs in such cases are now in the discretion of the Appellate Court (57 & 58 Vict. c. 14, s. 2), except in the case of cases stated under Baines' Act (12 & 13 Vict. c. 45); the CROWN CASES RESERVED Act, 1848 (11 & 12 Vict. c. 78).

[*Authorities.*—Archbold, *Quarter Sessions*, 5th ed.; Simey on *Quarter Sessions*, 1898.]

**Quasi Contracts.**—1. *Definition.*—The term “*quasi-contract*,” adopted from the Roman Law (see Just. *Inst.* 111, 27), is sometimes applied both to cases of true contract, where an actual agreement is inferred from the conduct of the parties, although no agreement is expressed, and sometimes to cases where, there being in fact no agreement at all, the plaintiff is permitted to use the form of an action of contract in order to recover against the defendant. It is properly applicable to the latter class of cases only. “A quasi contract is not a contract at all. The commonest sample of the class is the relation subsisting between two persons, one of whom has paid money to the other through mistake. The word *quasi* prefixed to a term in Roman Law, implies that the conception to which it serves as an index is connected with the conception with which the comparison is instituted by a strong superficial analogy or resemblance” (Maine’s *Ancient Law*, 7th ed., p. 344). Quasi contracts are classified by some English writers as “contracts implied by law,” that is to say, fictitious contracts (*e.g.* Leake on *Contracts*, ch. i. sec. ii. § 1).

“A quasi-contract right, or right of restoration, is a right to obtain the restoration of a benefit, or the equivalent thereof, conferred by the claimant, but unjustly retained by the defendant” (Keener, *Selection of Cases on the Law of Quasi Contract*; Amer. cited by Holland, *Jurisprudence*, 6th ed., p. 215 *n.*; cp. per Lord Mansfield in *Moses v. Macfarlane*, 1760, 2 Burr. 1008). Where a relation exists between two parties which involves the performance of certain duties by one of them, and the payment of a reward to him by the other, the law will imply, or the Court may infer a promise by such party to do that which is to be done by him (*Morgan v. Ravey*, 1861, 6 H. & N. 265, where the claim to recoupment against an innkeeper for lost goods was put upon “contract”). The most important example of quasi-contractual rights is that next referred to below. Many others, such as the right to sue on a JUDGMENT, and to recover money paid under mistake of fact (see MISTAKE), are more conveniently noticed under special titles.

2. *Payment of Another’s Debt.*—It is a principle of law that where one who is only secondarily liable performs (under compulsion of law) an



obligation for which another person is primarily liable, he may recover against that other person (per Willes, J., in *Roberts v. Crowe*, 1872, L. R. 7 C. P. 629, at p. 637; cp. Anson on *Contracts*, 8th ed., p. 363). So a vendor of shares sold subject to a liability, who is compelled to pay calls, is entitled to be indemnified by the purchaser (*l.c.*). The principle applies also where the plaintiff has been compelled by a distress or execution levied upon his goods, to pay a debt for which the defendant is ultimately liable (*Edmunds v. Wallingford*, 1885, 14 Q. B. D. 811; see, further, *Johnson v. Wild*, and *Hunter v. Hunt*, cited below). As where an underlessee is compelled to pay the head rent (*Exall v. Partridge*, 1799, 8 T. R. 308; 4 R. R. 656; *Sapsworth v. Fletcher*, 1792, 4 T. R. 511; *Taylor v. Zamira*, 1816, 6 Taun. 524; 16 R. R. 668), or the part-owner of a ship redeems it from a lien for a debt incurred partly or wholly on account of the defendant (*The Orchis*, 1890, 15 Prob. D. 38; *Johnson v. Royal Mail Co.*, 1867, L. R. 3 C. P. 38). But the debt must be paid under legal compulsion, for no one can make himself the creditor of another merely by paying off his debt. "A mere voluntary courtesy will not uphold an assumpsit, although a courtesy moved by a previous request will" (*Lampleigh v. Braithwait*, 1615, Hob. 105; 1 Smith's *Leading Cases*, 10th ed., 136). It is not enough that the defendant has obtained the benefit of the payment (*Falcke v. Scottish Imperial Assurance Co.*, 1886, 34 Ch. D. 234; *In re Winchelsea's Policy Trusts*, 1888, 39 Ch. D. 168; *Strutt v. Tippet*, 1890, 62 L. T. 475). In the cases last cited, it was sought to support a lien upon the money payable under a policy of insurance for premiums paid to save the policy from forfeiture, paid by the assignee of the mortgagor of the policy. The attempt failed. It was held that the lien claimed could be supported neither under any recognised quasi contract nor upon the analogy of the law of marine salvage. The debt paid must be a debt which the defendant was bound to pay. So where two houses included in one lease are separately subdemised, and one sublessee is compelled to pay the whole head rent, he cannot recover it in an action against the other (*Johnson v. Wild*, 1890, 44 Ch. D. 146; *Hunter v. Hunt*, 1845, 1 C. B. 300). And if one tenant in common pays for repairs, he cannot sue his co-tenant in common for a share of the cost (*Leigh v. Dickeson*, 1885, 15 Q. B. D. 60). See NEGOTIORUM GESTIO.

It is suggested in some of the cases that, in addition to the conditions of the right of repayment already stated, there must be some *privity* between the plaintiff and defendant at the time of the payment. In *Edwards v. Marsden* (1866, L. R. 1 C. P. 529), where the plaintiff, a bill of sale holder, after seizing the goods, left them on the grantor's premises, and they were used for the grantor's debt, it was held that the plaintiff had no claim for repayment by the grantor, because he had voluntarily left the goods on the premises. But this case has been dissented from (*Ex parte Bishop*, 1880, 15 Ch. D. at p. 417; *Edmunds v. Wallingford*, 1885, 14 Q. B. D. 811). In *Griffenhoope v. Danbury* (1854, 2 El. & Bl. 746), which is cited for the same proposition (Smith, *Leading Cases*, in the notes to *Lampleigh v. Braithwait*), it was held that a tenant whose goods had been distrained upon for tithes, could not recover against his landlord; but in the case in question he was himself ultimately liable to pay the tithes.

3. *Statutory Charge on Premises*.—If the occupier of premises is compelled to defray a statutory charge upon them which ought to be defrayed by the owner, it is doubtful whether he can recover against the latter. In *Gebhardt v. Saunders* ([1892] 2 Q. B. 452), Charles, J., expressed an opinion that the occupier could recover; but see *In re Boor*, 1889, 40 Ch. D.



572. If the owner pays, he probably cannot recover the payment from a former owner who has parted with the property after the obligation accrued, unless there is a contract for the payment between them (see *Tubbs v. Wynne*, [1897] 1 Q. B. 74).

4. *Agent of Necessity*.—The cases in which an “agent of necessity” can contract a debt on behalf of another against the will of the latter, as a wife for necessities supplied to her on her husband’s credit (see HUSBAND AND WIFE, vol. vi. p. 285), are instances of quasi contract. A child is not an agent of necessity to bind his father (*Bazeley v. Forder*, 1868, L. R. 3 Q. B. 559).

5. *Indemnity*.—Wherever the plaintiff has at the defendant’s request done something which has exposed him to a liability, he is entitled to be indemnified by the defendant (*Dugdale v. Lovering*, 1875, L. R. 10 C. P. 196), provided that the thing done was not apparently illegal, and not such that the plaintiff must have known, or be presumed to have known, it was illegal (*Betts v. Gibbin*, 1834, 2 Ad. & E. 57; *Palmer v. Wick, etc., Co.*, [1894] App. Cas. at p. 324; see below, 6.).

6. *Contribution*.—If one joint-debtor pays the whole debt, he can recover from his co-debtor the latter’s proportion of the payment (*Edger v. Knapp*, 1843, 6 Sco. N. R. 707; *Kemp v. Finden*, 1844, 12 Mee. & W. 421). See PRINCIPAL AND SURETY. There is no right to contribution between joint tortfeasors, though one pays the whole debt (*Merryweather v. Nixan*, 1799, 8 T. R. 186; 16 R. R. 810; 1 Smith, *Leading Cases*, and Notes).

[*Authorities*.—Smith, *Leading Cases*, notes to *Lampleigh v. Braithwait*; and Leake on *Contract*, 3rd ed., pp. 54–69.]

**Quasi Entail; Quasi Fee.**—If an estate *pur autre vie* be granted to A. and the heirs of his body or to A. and his heirs, the estate is called a quasi entail or quasi fee-simple respectively. The law as to estates *pur autre vie* and the doctrines of general and special occupancy have been treated of under LIFE, ESTATES FOR, and the reader should refer to that title for a detailed explanation. Suffice it to say here that, although originally in a grant as above mentioned, A., the first taker, would have an estate for life only, and his heirs or heirs of his body would, during the life of the *cestui-que vie*, take as occupants of the estate, and not as deriving title through A. Nevertheless judges and Legislature alike have for convenience applied to estates *pur autre vie* rules and names analogous to those of estates of inheritance; and accordingly both as to capacity and incapacity of alienation, the first taker of an estate *pur autre vie* and the first taker of an estate in fee-simple have been placed on the same footing.

The reason is that in each case the intention of the original grantor is looked at and effectuated; for where an estate is granted to A. and his heirs, the grantor cannot be said to have intended to impose any restrictions as to who shall be special occupant on A. predeceasing the *cestui-que vie*, and consequently A. has full power to alienate his “quasi fee-simple estate.” On the other hand, where the grant is to A. and the heirs of his body, the grantor clearly restricts the special occupancy to heirs of the body of A., and “this designation of the person who was to take afterwards as special occupant has been held sufficient to put a restraint on the first taker’s power of disposition” (*In re Barber’s Settled Estates*, 1881, 18 Ch. D. 624, 628).

And it may be laid down as a general rule that when an estate *pur autre vie* is made the subject of successive limitations, the power of



alienation of all the successive takers is to be regulated as far as possible by analogy to the rules which govern similar limitations of an estate in fee-simple.

Accordingly an executory devise of an estate *pur autre vie* cannot be defeated by the prior taker of a *quasi* estate in fee-simple (*In re Barber*, *loc. cit.*; and see *In re Michel*, *Moore v. Moore*, [1892] 2 Ch. 87).

The owner of a quasi entail may, if he be in possession, bar both issue and remaindermen by any conveyance, and there is no need of executing and enrolling a disentailing deed as is the case with an estate tail proper. But if the quasi tenant in tail is not in possession, the concurrence of the quasi tenant for life in possession is necessary to effectively bar remaindermen, otherwise the issue alone is barred, and the first taker has a *quasi* base fee. The anomaly in these two cases is particularly great, for the quasi tenant in tail in remainder has no estate whatever. Disposition by will does not in any way whatever bar the quasi entail, and is ineffectual.

It is for these reasons that, although the Statute de Donis applies only to estates of inheritance, the term "quasi entail" is conveniently used to denote an estate *pur autre vie* limited in a manner analogous to an estate tail.

**Quasi Partnership.**—The Partnership Act, 1890 (53 & 54 Vict. c. 39), enacts that everyone who, by words spoken or written or by conduct, represents himself, or who knowingly suffers himself to be represented, as a partner in a particular firm shall be liable as a partner to anyone who has, on the faith of any such representation, given credit to the firm, and whether the representation has or has not been made or communicated to the person who gives credit by or with the knowledge of the *apparent partner* making the representation or suffering it to be made.

This enactment is declaratory of the older law on the subject of "holding out," and defines what conduct by a person will by the law of estoppel make him a quasi partner. In other words, when a man does certain acts which lead the outside world to believe that he is a partner, he is estopped as between himself and the persons who have acted on the faith of his "holding himself out" as a partner from denying that he is a partner, and he is to them liable as such. To this principle the law laid down one exception, and this too is summed up in the proviso in the Act, that where, after a partner's death, the partnership business is continued in the old firm-name, the continued use of that name or of the deceased partner's name as part thereof shall not of itself make his executors' or administrators' estate or effects liable for any partnership debts contracted after his death. See PARTNERSHIP, vol. ix. at pp. 454, 456.

**Quasi Tenant at Sufferance.**—A tenant at sufferance is one who, having entered lawfully and taken possession, continues in possession after his title is ended by the laches of the lessor (see SUFFERANCE, TENANT AT). The term "quasi tenant at sufferance" is sometimes used to denote an underlessee, who continues in possession after the determination not only of his own but also of his lessor's title (*i.e.* after the determination of the original lease), without the assent or dissent of the reversioner.

**Quays.**—See HARBOURS; PIER



**Quebec.**—See CANADA.

**Queen.**—See SOVEREIGN.

**Queen Anne's Bounty.**—By 2 & 3 Anne, c. 11 (1703), that queen was empowered to incorporate by letters patent such persons as she should nominate or appoint to be one body politic and corporate, with a common seal and perpetual succession; and, further, to settle upon such corporation and their successors for ever the firstfruits and tenths of all benefices and other spiritual promotions, for the augmentation of the maintenance of the officiating clergy of the churches and chapels of the Church of England in England, Wales, and Berwick-upon-Tweed. These firstfruits and tenths had by ancient custom been paid to the pope until 1534, when, by 26 Hen. VIII. c. 3, they were annexed to the Crown; and since the Statute of Anne they have been called Queen Anne's Bounty.

By 1 Eliz. c. 4, ss. 5, 8, 13 (1558), the dean and canons of Windsor, and hospitals and schools, had been exempted from both these impositions, and vicarages not exceeding the yearly value of £10 (according to the valuation of 1535) from firstfruits; and by 5 Anne, c. 24 (1706), and 6 Anne, c. 27 (1707), livings of a yearly value not exceeding £50 were discharged of firstfruits, and of tenths where those had not been alienated by the Crown before 1703. The tenths of the first year are deducted from the firstfruits (27 Hen. VIII. c. 8 (1535), and 1 Eliz. c. 4 (1558)); a new incumbent is chargeable with only one-quarter of the firstfruits if he die within six months, with one-half only if he die within eighteen months, and with three-quarters only if he die within two years of his appointment. The computation of the year begins with the avoidance, and the profits during a vacancy go to the successor towards the payment (28 Hen. VIII. c. 11 (1536)). Archbishops and bishops are allowed four years in which to pay, paying one-quarter in each year, computed from the restoration of the temporalities, and if they die or are removed before four years, are discharged of all that remains unpaid; while deans, archdeacons, prebendaries, and other dignitaries are allowed the benefits given by 1 Eliz. c. 4 to incumbents (6 Anne, c. 27, 1707). The treasurer of Queen Anne's bounty is now the collector, and claims firstfruits and tenths from those liable to pay (1 & 2 Vict. c. 20 (1838)); tenths are due at Christmas (26 Hen. VIII. c. 3, s. 9 (1534)), and by 3 Geo. I. c. 10, s. 2 (1716), defaulters pay double value; while (27 Hen. VIII. c. 8) a new incumbent may distrain upon his predecessor's goods, if charged with tenths unpaid by him. The firstfruits and tenths of the different bishoprics were apportioned under 6 & 7 Will. IV. c. 77 (1837), and where ecclesiastical estates belonging to dignities are vested in the ecclesiastical commissioners, the latter, by 4 & 5 Vict. c. 39 (1841), pay the tenths, and one-twentieth yearly as a compensation for firstfruits.

On 3rd November 1704, Queen Anne, in pursuance of the Act of 1703, incorporated the archbishops, bishops, deans, speaker, master of the rolls, privy councillors, lords-lieutenant, judges, serjeants, attorney- and solicitor-general, advocate-general, chancellors and vice-chancellors of Oxford and Cambridge, lord mayor and aldermen, and mayors, to be a body corporate, by the name of the governors of the bounty of Queen Anne, for the augmentation of the maintenance of the poor clergy; and granted the firstfruits and tenths to them for the purposes aforesaid under rules to be established, with the general direction to hold four Courts at least in every year,



in March, June, September, and December, at which seven (by 28 & 29 Vict. c. 69, s. 5 (1865), reduced to five, including three archbishops and bishops), shall be a quorum, and despatch business by the votes of the majority; and by 1 & 2 Vict. c. 20, s. 17 (1838), an extraordinary Court, notified in the Gazette fourteen days before, is to be held between 1st February and 1st July. The governors were to inform themselves of the yearly value of the maintenance of all clergymen for whom £80 a year was not sufficiently provided, with particulars of the situation and distance from London of their churches or chapels; to appoint a secretary, treasurer, and other officers and servants; and to be empowered to admit into their corporation donors towards its object, entering the names of all contributors in a book. 1 Geo. I. stat. 2, c. 10 (1714) (see also 45 Geo. III. c. 84 (1805)), directed the bishops to inform themselves of the value of benefices and inform the governors, and gave to the rules made by the governors or by the Crown under sign manual the authority of rules made under the great seal; and, further, empowered the Court and committees of the governors to administer an oath to persons informing or being examined by them. The system adopted by the governors was to augment all cures by purchase, and not by pension, and to advance to each cure, for investment in a purchase, £200, beginning with cures under £10 a year, and proceeding to cures of greater value up to £45 a year, if private benefactors were willing in each case to give as much more; but the preference is to be given to cures of under £20, and only one-third of the available money in each year is to be given to cures of a value greater than that. After Michaelmas in each year no more proposals from benefactors are to be received, and the remaining money for the year is to be given in the first place to two or more Crown livings of £10 or under, chosen by lot, and then to as many other livings of like value, chosen in the same way, as the money available permits. Sec. 8 of the Act of 1714 gives to benefactors the patronage of augmented benefices, where agreements to that effect have been made; and the following sections provide for the cases of agreements made by persons seised in right of their wives, and incumbents, the wife being a necessary party in the former case, and the consent of the patron and ordinary being necessary in the latter (see also 3 & 4 Vict. c. 20 (1841)). By sec. 4 of the same Act of 1714, all benefices, donative or other, augmented, are to be perpetual cures (see PERPETUAL CURATE); and secs. 6 and 14 provide that augmented benefices shall lapse like presentation livings, if allowed to remain vacant for six months, and shall in all cases become subject to the jurisdiction of the ordinary, though formerly donatives exempt from it; but (s. 15) a donative is not to be augmented without the patron's consent. Sec. 13 authorises the exchange, for others of equal or greater value, of lands settled by the augmentation, a power extended by 43 Geo. III. c. 107, s. 2 (1803), to all the messuages, buildings, and lands belonging to the cure augmented; and by 2 & 3 Vict. c. 49 (1839), lands purchased for endowment may be sold with the governor's consent, if not in or near the parish, but if in or near it, the archbishop's consent is also necessary. Parsonage houses may be built, rebuilt, or purchased out of augmentation moneys (43 Geo. III. c. 107, s. 3). Forms of conveyances to the governors, and deeds for the granting of rents-charges for stipends and annuities, are provided by 1 Vict. c. 20, ss. 20, 21 (1838). 2 & 3 Vict. c. 49, s. 12 (1839), empowers the governors to hold endowments under the Church Building Acts (see ECCLESIASTICAL COMMISSIONERS), and private trustees to assign their endowments to the governors, with the latter's consent. And by 28 & 29 Vict. c. 69, s. 2 (1865), the governors may, for the purposes of the bounty, sell land



tithes, and other hereditaments vested in them. In addition to the augmentation of livings, the money of Queen Anne's Bounty is also employed in loans to the clergy on mortgage of the benefice. This was first authorised, for the building, repairing, or purchasing of parsonage houses, by 17 Geo. III. c. 51, s. 12 (1777), by which Act the amount to be lent was limited to £100, without interest, in the case of livings under £50 a year, and to a sum not exceeding two years' income, with interest at a rate not exceeding four per cent., in the case of livings above that value; and the same provisions are repeated for the same objects in 1 & 2 Vict. c. 23, s. 4 (1838); see also c. 106 of the same year, s. 72. By 59 & 60 Vict. c. 13 (1896), the term fixed for repayment of the money may, with the patron's consent, be extended for any period up to twenty years, and the amount of the annual instalment reduced by the governors at a meeting held before 31st December 1897, if the income of the benefice since the date of the mortgage has diminished. Incumbents may, with the bishop's and patron's consent, borrow from the governors the whole or part of the sum necessary for dilapidation works, and such sum as the governors think fit in respect of costs and expenses; such loan is never to exceed three years' income of the benefice, and is to be entered in their books under a dilapidation account in each case. The money may either be lent on the terms of repayment by annual instalments, with interest not exceeding four per cent., or by a terminable annuity; on the appointment of a new incumbent, the term of repayment may be extended, and the day of annual payment may be changed, with the incumbent's consent (Ecclesiastical Dilapidations Acts, 1871 and 1872, 34 & 35 Vict. c. 43; 35 & 36 Vict. c. 96).

See also articles ADVOWSON; DILAPIDATIONS, ECCLESIASTICAL; ECCLESIASTICAL COMMISSIONERS; GLEBE; PERPETUAL CURATE; PLURALITIES; SEQUESTRATION.

[*Authority*.—Phillimore, *Eccl. Law*, 2nd ed.]

**Queen Consort; Dowager; Regent or Regnant.**  
—See SOVEREIGN; REGENCY.

**Queen's Advocate.**—See ADVOCATE, QUEEN'S.

**Queen's Bench Division.**—The Queen's Bench Division is that Division of the High Court of Justice (the other being the CHANCERY DIVISION) to which was transferred by the Supreme Court of Judicature Act, 1873 (36 & 37 Vict. c. 66), the jurisdiction of the Court of Queen's Bench; and subsequently, by Order in Council in 1881, under sec. 32 of the above Act, those of the Courts of Common Pleas and Exchequer, with the Lord Chief Justice of England as its President.

A short survey of the history and jurisdiction of each of these three Courts will be found in the article SUPREME COURT.

In the Queen's Bench Division, as stated above, is merged all the jurisdiction of the three above-mentioned Superior Courts of Common Law.

It restrains all inferior Courts within the limits of their authority, by writs of CERTIORARI to examine and correct or remove before themselves, or of PROHIBITION to stop, their proceedings. It controls all civil and municipal corporations and bodies by writ of QUO WARRANTO; by writ



of MANDAMUS, if no other remedy avails, it superintends magisterial conduct; by writs of HABEAS CORPUS it grants speedy and summary relief in aid of those improperly deprived of their liberty. It has jurisdiction in all actions and proceedings for remedies in respect of all injuries to person, life, health, reputation, and personal liberty, and those affecting rights of parents, masters, and guardians; in respect of all injuries to personal property, whether in possession or in action, such as matters of debt, covenant, promises, contracts, both express and implied, warranties; in respect of all injuries to real property; and in respect of all injuries proceeding from or affecting the Crown. Nisi Prius sittings for the trial of these matters were so called because originally all questions of fact were appointed to be tried at Westminster, in some Easter or Michaelmas term, before a jury from the county where the cause of action arose, *nisi prius*, unless before the day fixed judges of assize should come into the said county. See CIRCUITS AND ASSIZES.

Certain parts of the business of the Courts, which used to be done before the judges sitting in Chambers, are, under 30 & 31 Vict. c. 68, dealt with by Masters of the Division under settled rules, subject to an appeal to the judge (see CHAMBERS, JUDGES'; MASTERS OF THE SUPREME COURT). The number of the judges remained for a long period at twelve; three were added at the beginning of the reign of William IV.; three more as election petition judges in 1868; of these eighteen, two were removed to the Court of Appeal and one to the House of Lords in 1876, leaving the present number at fifteen.

**Queen's Counsel.**—The appointment of King's Counsel, or Queen's Counsel, as the case may be, was unknown in its modern sense before the seventeenth century. Before that time, the only King's Counsel were certain serjeants-at-law, who acted, like the Attorney-General, not only as the legal advisers, or counsel, of the sovereign, but also as the Crown advocates, *Servientes Regis ad legem*. They were thus in reality, not nominally, the counsel of the sovereign. But Sir Francis Bacon, for reasons not very creditable, which need not be stated here, prevailed on Queen Elizabeth, in 1604, to appoint him "Queen's Counsel Extraordinary," he then being neither serjeant-at-law nor a law officer. After the death of the Queen he had less difficulty in obtaining letters patent from James I., making him "*one of our counsel learned in the law*" to hold office "*during good behaviour*" and "*at the pledge and fee of £40*" a year, payable half-yearly at Michaelmas and Easter. The next appointment was that of Francis North, who obtained a patent as King's Counsel from Charles II. in 1668, although he was neither a serjeant-at-law nor a law officer. The appointment of King's Counsel does not appear to have been conferred on other members of the bar for a long time after. About a hundred years after the last-mentioned appointment (1775), there were only fourteen King's Counsel; in 1789 there were twenty; in 1810 there were thirty; in 1816 there were twenty-two; in 1832 there were forty-four; in 1850 there were twenty-eight Queen's Counsel; in 1882 there were two hundred; and in the present year (1898) there are two hundred and thirty-six. Between the office of King's Counsel or Queen's Counsel and that of Attorney-General or Solicitor-General there is *in principle* no difference. They are both precluded from acting as counsel against the Crown or the Government without a special licence, which, however, in the case of a Queen's Counsel, is never refused. Formerly the cost of



this licence was about £9; gradually being reduced to the small sum of 10s.; the fee was abolished in 1886. The King's Counsel and Queen's Counsel always received the same yearly stipend (£40) as Sir Francis Bacon, until the latter end of 1831, when, by the action of Lord Grey's Government, it was discontinued. A barrister vacated his seat, if a member of Parliament, on taking the appointment of King's Counsel or Queen's Counsel. This disability caused the occasional substitution of a *patent of precedence*, which gives equal precedence in Court to its holder without subjecting him to the loss of a seat in Parliament, and it also enables the patentee to be retained in causes against the Crown without obtaining a licence. But it would seem that since the abolition of the stipend, a Queen's Counsel would no longer forfeit a seat in Parliament through being created a Queen's Counsel. A Queen's Counsel always ranked before a serjeant, in Court; but with this difference, that while a serjeant retained his recognised position in general society, a Queen's Counsel has no position out of Court. The form of appointment has varied from time to time. Its real intent, however, viz. that of giving precedence in Court to the holder, has always been maintained. At present the sovereign constitutes, ordains, and appoints A. B. "one of our counsel learned in the law," and next proceeds to grant him as such counsel "place, precedence, and pre-audience next after C. D. in our Courts," and "full power and sufficient authority to perform, do, and fulfil all and every the things which any other of our counsel learned in the law as one of our said counsel may do and fulfil." This grant is during pleasure only. A Queen's Counsel is appointed at the instance of the Lord Chancellor, who, however, first submits the name in an autograph letter to Her Majesty, who also signs the warrant for the issue of the patent. This last-mentioned document is under the Great Seal. By 13 & 14 Vict. c. 25 the name of Queen's Counsel, or of a barrister having a patent of precedence, may be inserted in a commission of assize. The dignity was not formerly bestowed on any member of the bar until his career had been marked by decided professional success; but of late years a custom has sprung up of appointing distinguished legal Civil servants, not in practice at the bar (such as Sir A. Stephenson, Mr. W. E. Davidson, or Mr. J. F. Rotton), to the dignity. It is rarely conferred, in any event, on men of less than ten or twelve years' standing. The celebrated Lord Erskine, however, received this distinction when he had been only five years at the bar.

Queen's Counsel are sworn in presence of the Lord Chancellor by the clerk of the Crown. The oath, which is rather quaint, is as follows:—"I do declare that well and truly I will serve the Queen as one of her counsel learned in the law, and truly council the Queen in her matters when I shall be called, and duly and truly minister the Queen's matters and sue the Queen's process after the course of the law and after my cunning. For any matter against the Queen, when the Queen is party, I will take no wage nor fee of any man. I will duly in convenient time speed such matters as any person shall have to do in the law against the Queen as I may lawfully do without long delay, tracting, or tarrying the party of his lawful process in that to me belongeth. I will be attendant to the Queen's matters when I be called thereto. So help me God."

The Duchy of Lancaster used to possess its own Queen's Counsel. They were called within the bar of the Common Pleas of Lancaster by the senior judge on circuit (who was always appointed by the Duchy to be a judge of its Court of Common Pleas), but they appear to have received no patent. A case occurred a few years ago of a Queen's Counsel



of the Duchy requesting the judge to reduce him once again to the "stuff gown." This was acceded to, and the silk gown of the retiring Queen's Counsel formally taken off him in open court as a sign of his return to the rank of an utter barrister.

**Queen's Evidence.**—See ACCOMPLICE; APPROVER; INFORMER.

**Queensland**—A British colony occupying the north-eastern portion of Australia. The Moreton Bay Settlement was formed in connection with New South Wales in 1824; the territory was thrown open to colonisation in 1842; and became a separate colony on the 10th December 1859 (see the Imperial Act, 18 & 19 Vict. c. 54, and Order in Council of 6th June 1859). The Governor of Queensland is assisted by an executive council; the Legislature consists of the Governor, the Legislative Council, members of which are nominated for life, and the Legislative Assembly, members of which are elected by manhood suffrage (see the Constitution Act, No. 38, of 1867). In 1885 the two Houses differed as to the power of the Legislative Council to amend a money bill; by the desire of both parties the matter was referred to the Judicial Committee of the Privy Council: the Committee reported in favour of the Assembly. The laws of Queensland are English in their origin. There is an appeal from the Supreme Court of the colony to the Queen in Council. See PRIVY COUNCIL.

[*Authorities.*—Colonial Office List, and Queensland Statutes. A draft code of the criminal law has been prepared, and is now under consideration. See the articles AUSTRALASIA; AUSTRALIA; and NEW GUINEA.]

**Queen's Pleasure.**—See ASYLUMS, vol. i. at p. 393.

**Queen's Printers.**—At Common Law the Crown has the exclusive right of printing and publishing the Bible, Acts of Parliament, Proclamations, and other documents of a public nature. The origin of this right is explained in the arguments on both sides in *Donaldson v. Beckett*, 1774, 2 Bro. P. C. 129:—

"Prerogative copies, such as the Bible and books of Divine Service, do not apply to the present case; they are left to the superintendence of the Crown, as the head and sovereign of the State upon principles of public utility. . . . Acts of Parliament, it is admitted, are the work of the Legislature, and therefore under the direction of the Crown, as the executive part of the Constitution": "It is a point too well established to be denied, that at common law the sole and exclusive right of multiplying for sale the copies of Acts of Parliament, Proclamations, and other papers of a public nature, belongs to the king and his patentees; not in consequence of any prerogative over the art of printing, but on account of his peculiar interest as the executive power in all publications and acts of State flowing from himself or Parliament."

And see Copinger on *Copyright*, 3rd ed., 310; Scrutton, *Copyright*, p. 6.

With regard to the Bible, it has been suggested (see Blackstone's *Commentaries*) that, in addition to the duty imposed on the king as head of the Church (see ROYAL SUPREMACY) to superintend the publishing of the Bible, he had a proprietary right in the publication of the same, arising from the fact that the translation of the Bible was paid for by the Crown; but this has been doubted by Viscount Fitzgibbon (Lord Chancellor of Ireland) in the case of *Grierson v. Jackson*, 1794, 1 Ridg. L. & S. 304, who criticises



the statement quoted from Blackstone's *Commentaries*. These exclusive rights were conferred by letters patent upon the king's printer, and in respect of Bibles, and concurrently on the universities of Oxford and Cambridge. There are separate patents for each of the three kingdoms.

It seems to be the better opinion that the king may grant to particular persons the sole use of some particular employments (as of printing the holy Scriptures and Law Books) whereof an unrestricted liberty might be of dangerous consequence (Hawk. P.C., bk. i. c. 79, s. 6); but Lord Fitzgibbon, in the case above cited, seems to think the statement in Hawkins too wide, for he says: "I can well conceive that the king should have the power to grant a patent to print the Statute Books, because it is necessary there should be a responsibility for correct printing, and because the copy can be had only from the Rolls of Parliament which are within the authority of the Crown. I can conceive that the king, as head of the Church, may say that there shall be but one man who shall print Bibles and books of Common Prayer *for use in churches and other particular purposes, and that none other shall be deemed correct copies for such purposes*; but I cannot conceive that the king has any prerogative to grant a monopoly as to Bibles for the instruction of mankind in revealed religion"

(1 Ridg. L. & S. at 305).

Equity judges have always shown themselves reluctant to interfere on motion unless the patent has been established at law (*Baskett v. Cunningham*, 1762, 2 Eden, 137; *Anon.*, 1682, 1 Vern. 120; *Grierson v. Jackson*, 1794, 1 Ridg. L. & S. 304; and *Grierson v. Eyre*, 1804, 9 Ves. 341); but an injunction has sometimes been continued until the trial, where there was a doubt about the legal rights of the parties (*Universities of Oxford and Cambridge v. Richardson*, 1802, 6 Ves. 689). An edition of the statutes with annotations may be within the patent of the king's printer if the notes are merely collusive (*Baskett v. Cunningham*, 1762, 2 Eden, 137). Questions have sometimes arisen between the queen's printers for the three kingdoms. The interlocutor of the Court of Session in *Baskett v. Watson* (House of Lords, 16th Jan. 1717, see *Universities of Oxford and Cambridge v. Richardson*, 1802, 6 Ves. 189) was varied so as to confine the right of the king's printer to print and sell Bibles to Scotland; and in *Baskett v. Parsons*, 1718, 1719 (see 6 Ves. 699), the decision was three times made at the suit of the king's printer upon books that he had the sole right to sell in England, that a subject cannot buy under the authority of the patent for Scotland similar books printed there for the purpose of introducing them into England for the purpose of selling them there (see Copinger, *Copyright*, 3rd ed., 314).

The Controller of H.M.'s Stationery Office is now by patent the queen's printer of Acts of Parliament, and the actual printers are mere agents. By 8 & 9 Vict. c. 113, s. 3, all copies of private and local and personal Acts of Parliament, if purporting to be printed by the queen's printers, shall be admitted as evidence thereof, by all Courts, judges, justices, and others, without any proof being given that such copies were so printed; and sec. 4 makes provision for the punishment of persons printing or offering in evidence private Acts which falsely purport to have been printed by the queen's printer. An Act of 1882 (45 Vict. c. 9) makes a like provision as to documents printed by authority.

**Queen's Prison.**—This was a prison in Southwark constituted under 5 & 6 Vict. c. 22, in 1842, for the purpose of consolidating the Queen's Bench, Fleet, and Marshalsea Prisons, and was intended to take the place of these ancient prisons for debtors, bankrupts, and persons charged with contempt of Her Majesty's various Courts. The occasion of constituting it was the abolition of arrest on mesne process in civil



actions, and the amendment of the laws of insolvency, whereby the Queen's Bench Prison alone had become large enough to hold all the debtors and others who had before been confined in one or other of the three. The Act declared that it therefore should be the only prison for the future, and be called the Queen's Prison; and the offices of the Fleet and Marshalsea were abolished.

By the Queen's Prison Discontinuance Act, 1862 (25 & 26 Vict. c. 104), committal to the Queen's Prison was prohibited, and White Cross Street Prison, a debtors' prison belonging to the Sheriffs of London and Middlesex, was substituted. By sec. 12, if the City of London provided proper accommodation in another prison, then such prison should be substituted for Whitecross Street Prison. In accordance with this provision all the prisoners in Whitecross Street were removed in 1870 to the City Prison at Holloway.

[*Authority*.—Wheatley and Cunningham, *London Past and Present*.

**Queen's Proctor** is the proctor or solicitor representing the Crown in the Courts of Probate and Divorce. In petitions for dissolution of marriage, or for declarations of nullity of marriage, the Queen's Proctor may, under the direction of the Attorney-General, and by leave of the Court, intervene in the suit for the purpose of proving collusion between the parties (23 & 24 Vict. c. 144, s. 7; 36 & 37 Vict. c. 31).

A decree *nisi* generally becomes absolute after the expiration of six months, and the Queen's Proctor must therefore intervene within that time. But in *Hamilton v. Hamilton*, 1875, 33 L. T. 462, where the Queen's Proctor applied for a postponement on affidavits that he had a case for intervention, but had not yet been able to take the directions of the Attorney-General, the Court refused to make a decree *nisi* absolute, although the six months had expired; and the same course was adopted in *Palmer v. Palmer*, 1865, 4 Sw. & Tr. 143.

Sec. 7 of the M. C. Act, 1860, confers on the Queen's Proctor the power to intervene in the case of *collusion* only; he may, however, as one of the public, show cause against a decree *nisi* being made absolute (*Masters v. Masters*, 1864, 34 L. J. P. & M. 7). There appears to be a difference in cases respecting the time when he ought to intervene, officially on the ground of collusion, and privately as one of the public on the ground of material facts not brought to the notice of the Court. In *Hudson v. Hudson*, 1875, 1 P. D. 68, Sir James Hannen says on this point: "If, then, the information given to the Queen's Proctor before the decree *nisi* does not give rise to a suspicion of collusion, but only brings to his knowledge matters material to the due decision of the case, he is not entitled to take any step, and the direction of the Attorney-General would probably be that he should watch the case, to see if these material facts are brought to the notice of the Court. If at the trial they should be, there will be no need for the Queen's Proctor to do anything more, for he would not be entitled to have the same charges tried over again, unless material facts were not brought to the notice of the Court. If, however, those material facts are not so brought to the notice of the Court by the parties, he will then be entitled as one of the public, but still acting under the direction of the Attorney-General, to show cause against the decree being made absolute."

The Queen's Proctor may intervene to show cause why a decree *nisi* should not be made absolute, on the ground that the charge of adultery on which it was granted was not true, and he is at liberty to adduce evidence



of fresh material facts for that purpose. In such an intervention it is sufficient for the Queen's Proctor to plead that the decree was obtained contrary to the justice of the case by reason of material facts not having been brought to the knowledge of the Court (*Crawford v. Crawford*, 1886, 11 P. D. 150).

The Queen's Proctor intervening in a suit under sec. 7 of the M. C. Act, 1860, and alleging collusion, is at liberty in the same plea to allege the suppression of material facts, or any other matters, in opposition to the decree (*Dering v. Dering*, 1868, L. R. 1 P. & D. 531).

**Queen's Regulations and Orders for the Army and Navy.**—The Crown issues regulations and orders for the government, discipline, and general economy of the military and naval forces—regular, reserve, and volunteer—under the sign manual. They carry out statutory provisions relating to those forces, or they supplement them, and they have validity on the general principle that the forces are under the command of the Crown under statutory regulation. If *ultra vires* in any respect, such, *e.g.*, as including persons not subject to military law, or in dealing with civil rights or property, the law would not enforce them (see ARMY). What are specially known as the "Queen's Regulations and Orders for the Army," are issued to the army by the Commander-in-Chief, and in his name, by the command of the sovereign. Royal warrants, issued through the department of the Secretary of State for War, provide for special matters, such as pay, appointment, promotion, etc.

In the navy the regulations and instructions are established by Orders in Council, countersigned and issued by the Lords of the Admiralty, who also make regulations for the marines under the Army Act, 1881, which are defined as Queen's Regulations. By the Reserve Forces Act, 1882 (45 & 46 Vict. c. 48), s. 20, the regulations of the army reserve and the militia reserve (see RESERVE FORCES) are made by order, signified under the hand of a Secretary of State, *i.e.* the Secretary of State for War. A like provision is made under the Militia Act, 1882 (45 & 46 Vict. c. 49), s. 4, for the militia. Regulations for the volunteers (including yeomanry cavalry) are made under the Volunteer Act, 1863 (26 & 27 Vict. c. 65), s. 16, by the Secretary of State. He also is empowered by the Army Act, 1881, s. 93, to make regulations as to enlistment of soldiers in the regular army. By the Regimental Debts Act, 1893 (56 Vict. c. 5), s. 13, regulations are to be made by warrant under the royal sign manual. Proof of these regulations may be given under the Documentary Evidence Acts, 1868 and 1882 (31 & 32 Vict. c. 37, and 45 & 46 Vict. c. 9, s. 1), by a copy of the Gazette, the Government printer's printed copy, or certified copy or extract. The Secretary of State or Under-Secretary is the certifying officer. See ARMY; MILITIA; NAVY; RESERVE FORCES; SOVEREIGN; VOLUNTEERS; YEOMANRY.

**Queen's Remembrancer** (or King's Remembrancer)—Formerly an officer of the Exchequer, now of the Supreme Court. The office is one of great antiquity the holder whereof was anciently called *Remembrancer*, *Memorator*, and *Rememorator* (see Maddox's *Hist. of the Exchequer*).

There were at one time three Remembrancers of the Exchequer, called Clerks of the Remembrance, distinguished under the titles of King's Remembrancer, Lord Treasurer's Remembrancer, and the Remembrancer of the



**First Fruits.** The two latter have ceased to exist, the former of the two upon merger of the duties with those of the Queen's Remembrancer (3 & 4 Will. iv. c. 99, s. 41), the latter in consequence of the diversion of the fund (1 Vict. c. 20). In 1859 the Queen's Remembrancer ceased to be a separate officer, and was thereafter required to be a Master of the Court of Exchequer (Queen's Remembrancers Act, 1859, 22 & 23 Vict. c. 21, s. 1).

By sec. 77 of the Jud. Act, 1873, the Queen's Remembrancer was attached to the Supreme Court; by sec. 6 of the Jud. (Officers) Act, 1879, he was transferred to the central office of the Supreme Court, and became, under sec. 8, a Master of the Supreme Court. On the occurrence of a vacancy, the office is to be filled by the Senior Master of the Supreme Court (sec. 14 (3)).

Formerly there were considerable duties attaching to the office; certain ceremonial matters as to the nomination of Sheriffs (50 & 51 Vict. c. 55, s. 5; and see SHERIFF), the swearing in of the Lord Mayor of the City of London, the trial of the Pyx (see ASSAY), and the acknowledgments of homage for Crown lands (Queen's Remembrancers Act, 1859, s. 43) are some of the functions which still remain. More important duties, however, relate to proceedings for the recovery of debts and penalties due to the Crown, for the recovery of land by information in cases of intrusion, and the recovery of legacy and succession duties not paid (see Second Report of the Legal Departments Commission, July 1874, p. 17).

The following statutes relate to the duties of the office:—

(a) 3 & 4 Will. iv. c. 99, as to accounting for and the estreat of fines, issues, penalties, and recognisances.

(b) 5 & 6 Vict. c. 86, s. 8, as to the return of writs.

(c) 22 & 23 Vict. c. 21 (Queen's Remembrancers Act, 1859), and the Rules of June 1860 made under the Act (6 H. & N. 1), regulate the practice on the revenue side.

(d) 28 & 29 Vict. c. 104 (The Crown Suits, etc., Act, 1865), and the rules made thereunder (L. R. 1 Ex. 389), govern the practice in Crown suits and other matters on the revenue side of the Queen's Bench Division.

The practice on the revenue side is generally excluded from the operation of the Rules of the Supreme Court, 1883 (Order 68, r. 1 (c)), but some few of the rules have been applied provisionally, so far as they may be applicable (r. 2).

**Que Estate.**—See PRESCRIPTION.

**Questman**—A churchwarden or sidesman. Originally the duty of suppressing profaneness and immorality was intrusted to two persons chosen by the parishioners as assistants to the churchwardens, who from their power of inquiring into offences detrimental to the interests of religion, and of presenting the offenders to the next provincial council or episcopal synod, were called *questmen* or *synod's men*, which last appellation has been converted into the name of *sidesmen*; but a great part of the duty of these questmen in course of time devolved on the churchwardens; and it would seem from the canons of 1603, that at the date of those canons the offices of churchwarden and questman were one and the same (Prideaux's *Churchwardens' Guide*, p. 2).

**Quia emptores.**—The Statute 18 Edw. i. c. 1 is frequently referred to as the Statute *Quia emptores*, these being its first two words.



It enacts that: "Whereas purchasers of lands and tenements of the fees of great men and other lords have many times heretofore entered into their fees, to the prejudice of the lords to whom the freeholders of such great men have sold their lands and tenements to be holden in fee of their feoffors, and not of the chief lords of the fee, whereby the same chief lords have many times lost their escheats, marriages, wardships, etc. . . . From thenceforth it shall be lawful to every freeman to sell at his own pleasure his lands and tenements or part of them, so that the feoffee shall hold the same lands or tenements of the chief lord of the same fee by such service and customs as his feoffor held before."

This enactment is known also as the Statute of Westminster the Third, and was passed in 1290. It will be seen from the quotation above that it did something more than abolish subinfeudation. It expressly recognised the right of alienation. It provided further that if part of the lands only were sold, the services to the lord should be apportioned, and by the final section it expressly excludes alienation in mortmain. "And it is to be understood that by the sales or purchases of lands or tenements or any parcels of them, such lands or tenements shall in nowise come into mortmain either in part or in whole, neither by policy nor craft contrary to the form of statute made thereupon of late."

Subinfeudation, alienation of land generally and in mortmain, are treated of under ESTATES; CHARITIES; HEIRS; MORTMAIN; and to these headings the reader should refer for the history of the legislation of which the Statute *Quia emptores* is so early a landmark.

**Quia improvide emanavit**—A supersedeas to quash and nullify a writ erroneously issued.

**Quia timet.**—"A court of equity will prevent injury in some cases by interposing before any injury has been suffered; by a bill which has sometimes been called a bill *quia timet* in analogy to proceedings at the common law, where in some cases a writ may be maintained before any molestation, distress, or impleading." This passage is quoted from Mitford's *Pleadings in Chancery*, (ed. 1847, p. 172). The common law proceedings referred to have long been obsolete; the old writs are enumerated in *Co. Litt.* 100 a. The equitable relief can now be obtained in all Courts.

A surety, even before he is sued by the creditor, may compel the principal debtor to pay (Mitford, p. 172; *Wooldridge v. Norris*, 1868, L. R. 6 Eq. 410; *Wolmershausen v. Gullick*, [1893] 2 Ch. 514).

A trustee, who has incurred a liability as such, may obtain an order that the *cestui-que trust* shall indemnify him before he has been called upon to pay (*In re Blondell*, 1888, 40 Ch. D. at p. 377, per Stirling, J.; *Hobbs v. Wayet*, 1887, 36 Ch. D. 256). But the mere fact that shares are standing in the trustee's name, upon which a call may be made, does not justify him in bringing an action for indemnity (*Hughes-Hallett v. Indian Mammoth Gold Mines*, 1882, 22 Ch. D. 561).

The most important example of relief *quia timet* is the grant of an injunction to restrain a threatened nuisance or other interference with the applicant's legal rights. For this the applicant must show a strong case of probability that the mischief apprehended from the future nuisance will occur. See *A.-G. v. Manchester Corporation*, [1893] 2 Ch. 87 (a small-pox hospital case), where the authorities are collected.



In some authorities the case required for a *quia timet* injunction has been put much higher. Thus in *Fletcher v. Bealey* (1884, 28 Ch. D. 688, Pearson, J.) it was proved that the deposit of refuse alkaline material complained of would, in a few years time, cause a noxious liquid to flow into the plaintiff's stream which would ruin the water for his purposes; but the action was dismissed, because it was possible, by due care, to prevent the liquid flowing into the river. So if the defendant has covenanted not to carry on an offensive trade, it is not sufficient to show that he has stated a trade which is not *per se* a nuisance, even though it be that of a slaughter-house keeper (*Rapley v. Smart*, 1894, W. N. 2; cp. *Pattisson v. Gilford*, 1874, L. R. 18 Eq. 259).

The possibility of legal proceedings being taken upon an instrument after the evidence which would show a defence to them is lost, is not a ground upon which an action for cancellation of the instrument, *quia timet*, may be maintained. The remedy is by an action to perpetuate testimony (*Brooking v. Maudslay*, 1888, 38 Ch. D. 636). See INJUNCTION, vol. vi. p. 464, at p. 470 *et passim*.

**Quick with Child.**—See LEGITIMACY; MATRONS, JURY OF.

**Quiet Enjoyment.**—As to covenants for quiet enjoyment in leases, see LANDLORD AND TENANT, vol. vii. at p. 215. It is intended here to treat of the covenant only as one of the covenants for title as between vendor and purchaser. The covenants for seisin, right to convey, quiet enjoyment, freedom from incumbrances and further assurance constitute the five ordinary covenants for title formerly inserted and now usually implied in a conveyance. The covenant for quiet enjoyment is to the effect that the premises conveyed shall and may from time to time, and at all times thereafter, be held and enjoyed, and the rents, issues, and profits thereof received and taken by the grantee, his appointees, heirs, and assigns to and for his and their own absolute use and benefit without any lawful "let, suit, trouble, denial, hindrance, eviction, ejection, molestation, disturbance, or interruption" whatsoever, of, from, or by the grantor or any person or persons lawfully or equitably claiming or to claim by, through, from, under, or in trust for him.

Express covenants of this kind are now of rare occurrence, conveyancers relying on the provisions of the Conveyancing Act, 1881 (44 & 45 Vict. c. 41). See CONVEYANCING ACTS.

In a conveyance for valuable consideration by a person who conveys and is expressed to convey as "beneficial owner," there is deemed to be included, and by virtue of sec. 7 of the Act implied, a full covenant (*inter alia*) for quiet enjoyment by the person or by each person who so conveys, as far as regards the subject-matter or share of the subject-matter conveyed by him, with the person or persons to whom the conveyance is made. A similar covenant for quiet enjoyment is implied by a mortgagor who conveys as beneficial owner. In conveyances by way of settlement where the person conveys as settlor, and in conveyances by trustees or mortgagees expressed to convey as "trustee" or "mortgagee," or personal representative or committee of a lunatic not so found by inquisition, no such covenant is implied; but for the purpose of giving a covenant for quiet enjoyment, the conveying party may be expressed to convey as "beneficial owner," although he is not in fact a beneficial owner, and this is in practice frequently done.



And the Court may, under sec. 24 of the Lunacy Act, 1890 (53 & 54 Vict. c. 5), authorise the committee of a lunatic not only to convey property on the lunatic's behalf, but also to enter into covenants for title, by such committee being expressed in the conveyance to convey as beneficial owner (*In re Ray*, [1896] 1 Ch. 468).

Similarly, where a person directs as "beneficial owner" that a third party shall convey, the person giving the direction is deemed to convey as "beneficial owner" within the section the subject-matter conveyed by his direction, and a covenant on his part to the like effect is implied accordingly (see Conveyancing Act, 1881, s. 7, F. (2)). A conveyance under this section includes a deed (but not a demise by way of lease at a rent or any other customary assurance) conferring the right to admittance to copyhold or customary land. The covenant for quiet enjoyment implied by the section is therein set out at length, and may be referred to for the form of such covenants. A precedent will also be found in Williams, *Real Property*, Appendix D.

The covenant runs with the land, and as to the benefit of the covenants implied by the Conveyancing Act, it is by subsec. (6) of sec. 7 enacted that it shall be incident to the estate and interest of the implied covenantee, and shall be enforceable by every person in whom that estate or interest is for the whole or any part thereof from time to time vested. See generally as to the benefit of these covenants, *David v. Sabin*, [1893] 1 Ch. 523.

By virtue also of certain other statutes, of which the Lands Clauses Consolidation Act, 1845, is the most important, a covenant (*inter alia*) for quiet enjoyment by the promoters of an undertaking is implied by the use of the word "grant" by the conveying party in the conveyance. As to this and also the old law on the covenants for title implied by the use of that word in the conveyance, see GRANT, and Hargrave and Butler's Note to *Co. Litt.* s. 384 *a*.

The covenant for quiet enjoyment is not broken until some entry or actual disturbance is made upon the person in possession (*Shep. Touch.* 171). And a declaration of a right (*e.g.* of common) is not a disturbance. In order for the plaintiff to recover for breach of the ordinary covenant for title, he must show that by reason of some act or thing done by the defendant or any of his predecessors in title, the defendant had no title to so grant the land. Accordingly, where after a conveyance a decree was made in a Chancery suit, declaring the land to be subject to a general right of common over it, it was held that the decree alone without any entry or actual disturbance of the grantee (plaintiff) in his possession was no breach of the grantor's (defendant's) covenant for quiet enjoyment (*Howard v. Maitland*, 1883, 11 Q. B. D. 695). As to the measure of damages for breach of the covenant, see *Child v. Stenning*, 1879, 11 Ch. D. 82; *Windsor and Annapolis Rwy. Co. v. The Queen and Western Counties Rwy. Co.*, 1886, 11 App. Cas. 607.

Where a testator gave his son a life interest, with a condition that the trustees should pay thereout £50 a year to a third party so long as the son should reside with such party, and the son, while away, assigned his life interest as "*beneficial owner*," it was held that on the son's again returning to live with the party in question, the sum of £50 was again payable. But the majority of the Court of Appeal who thus decided held that the son had but a life estate, subject to a defeasance to the extent of £50 a year for the third party, and that this was all he assigned, and in respect of which the covenant as beneficial owner was given; whereas Kay, L.J., dissenting, construed the gift as giving a power to the son, by living with the party, to direct that £50, part of his income, should be thus paid, and held that any



attempt to exercise such power after the assignment would be a derogation from the grant (*In re Greenwood, Priestley v. Greenwood*, 1892, W. N. 20).

Where a lease contains a covenant for quiet enjoyment without interruption by the lessor, or any person claiming through him, and a railway company having statutory powers to make a railway and acquire the property comprised in the lease, acquires the reversion by agreement with the lessor, and subsequently without negligence damages the structure of the lessee's premises, the lessee cannot sue on his covenant for quiet enjoyment. For in such a case both the lessee and lessor must be taken to have known at the granting of the lease that the interest of either of them might be acquired by the railway company, and injuriously affected by the company in exercising its statutory powers. And the true extent of the covenant for quiet enjoyment is to his own acts and those of his assignees, but not to acts of a railway company in the exercise of statutory powers, the company not being in the true sense voluntary assignees, although the reversion has not as a fact been acquired compulsorily. And the lessee not being liable under the covenant, the company, his assignees, are not liable, and the lessor must resort to the statutory remedies, viz. compensation under sec. 6 of the Railway Clauses Act, 1845, or sec. 68 of the Lands Clauses Act, 1845 (*Anderson v. Manchester, Sheffield, and Lincolnshire Rwy. Co.*, 1898, W. N. 36; L. J. 197). As to quiet enjoyment, or possession, of goods, see SALE OF GOODS.

**Quiet in Harness.**—The meaning of this term is obvious, but the buyer of a horse who desires a warranty in this respect should be careful to see that it is explicit, or is sufficiently general in its terms to include this qualification. A warranty that a horse is "sound and quiet in all respects," has been held to include the being quiet in harness (*Smith v. Parsons*, 1837, 8 Car. & P. 199, per Lord Abinger, C.B.). But where the warranty was as follows, viz.: "Received from A. the sum of £60 for a black horse, rising five years, quiet to ride and drive, and warranted sound up to this date, or subject to the examination of a veterinary surgeon"; it was held that there was no warranty that the horse was quiet to ride and drive (*Anthony v. Halstead*, 1877, 37 L. T. 433). Proof that a horse is a good drawer only will not satisfy a warranty that he is "a good drawer and pulls quietly in harness." It is clear that these are convertible terms, because no horse can be said to be a good drawer if he will not pull quietly in harness, and therefore proof that he is a good puller will not satisfy the warranty; the word "good" must mean good in all particulars (*Coltherd v. Puncheon*, 1822, 2 Dow. & Ry. 10).

But in setting up a breach of such a warranty, it must be clearly proved that the horse at the time of sale was unfit for the purpose for which he was bought; and if he has gone quietly with persons of ordinary skill, there will be a strong presumption that he answers his warranty. Where a horse warranted "a thorough-broke horse for a gig," kicked and broke the gig, etc., the first time he was driven by the buyer, which was two months after the sale, but in the meantime other persons had driven him, and he had always answered his warranty, it was held that this was no breach, because, as the horse had previously behaved as he had been warranted, his bad conduct must have been owing to the buyer's want of skill in driving (*Geddes v. Pennington*, 1817, 5 Dow, 159). A horse put into a new harness and an unaccustomed carriage once or twice, might kick, and yet be deserving of a warranty of being quiet in harness (Oliphant, 5th ed., 117). See HORSES.



**Quietus** (FREED OR ACQUITTED)—A word made use of in the Exchequer in the discharge given to the accountants to the Crown, *e.g.* a sheriff (Wharton). Among the duties of the sheriff, Dalton gives—

Truly to gather and bring into the Exchequer the profits and monies due to the king within his bailiwick, to wit, the king's rents, farms, debts, issues, amerciements, fines, and forfeitures ;

but on the other hand he was allowed by what was called a bill of cravings to bring into the account any payments made by him on behalf of the Crown (*e.g.* for judges' lodgings, expenses of executions, etc.). If when the sheriff's account of charge, discharge, and allowance was finished and completed the account exactly balanced, the Clerk of the Pipe used to make out the sheriff's quietus, which is a transcript of the items of charge and discharge on the whole record subscribed, "and he is quit." If there was a balance against the sheriff, he could not have a quietus until he had paid it in (Gilb. 153), but if the balance was in favour of the sheriff, he could obtain a certificate of surplusage from the Pipe Office (3 Geo. I. c. 15, s. 7), upon production of which the Treasury would repay him the amount in question.

Various statutes were passed simplifying the procedure by which sheriffs' accounts were audited, and the law on the subject has now been consolidated and further amended by the Sheriffs' Act, 1887 (50 & 51 Vict. c. 55). See SHERIFF.

[*Authorities.*—Price's *Exchequer Practice*, 1830; Watson on *Sheriffs*, 2nd ed. 1848; Mather's *Sheriff Law*, 1894.]

**Qui tam.**—A penal action brought to recover a penalty divisible between the plaintiff and the Crown is called a *qui tam* action, because the plaintiff sues "as well for" the Crown as for himself. See the form of writ of execution given in Chitty's *Archbold's Forms*, 11th ed., p. 377. See PENALTY; PENAL (*i.e.* popular) STATUTE.

**Quit Claim.**—"*Quietia clamantia* is a release or acquitting of a man for any action that he hath, or might or may have, against him. Also, a quitting of one's claim or title" (Cowel). The words are the origin of the phrase "cry quits," and the term in the earlier period is used as synonymous with release, not only as a descriptive but also as an operative word. It is most frequently used in the cases of a transfer of rights adverse to the transferee (see Pollock and Maitland's *History of English Law*, vol. ii. p. 90).

**Quit-Rent.**—*Quietus redditus*, or quit-rent, is a small yearly payment made from time immemorial by freeholders or copyholders of a manor to the lord. The expression implies that thereby the tenant gets quit and free from all other services (2 Blackstone, 42). In the case of freeholds, these rents are sometimes called *chief rents*.

Quit-rents are the few rare instances now existing of payments of rent in respect of freeholds. They are, as a rule, of a very trifling amount, and represent a payment whereby the old tenant by fealty commuted for his services. The lord may distrain for arrears. These rents were in early times known also by the name of white rents (*redditus albi*), inasmuch as



they were paid in silver, and by way of contrast to black-mail (*reditus nigri*), or rent reserved in baser coin or in kind (cp. 2 Blackstone, *loc. cit.*).

The Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 45, provides for the redemption of quit-rents and other perpetual charges, where there is a person seised in fee-simple of the rent, or able to give a discharge for the purchase-money; and by the Copyhold Act, 1894 (57 & 58 Vict. c. 46), it is enacted that a lord or tenant of any land liable to any quit-rent, or other manorial incident whatsoever, may require and compel the extinguishment of such rights or incidents affecting the land, and the release and enfranchisement of the land subject thereto, in like manner as nearly as possible as is provided by the Act with respect to the right to compel the enfranchisement of copyhold land, and to the proceedings thereupon (see COPYHOLD).

A quit-rent payable in respect of a copyhold tenement is not like a rent reserved upon a lease excepted from the operation of the Statutes of Limitation, and it has been recently held that such a rent is more analogous in its nature and properties to a quit-rent payable in respect of freehold land than to a rent reserved on a demise, and therefore where it had remained unpaid for more than twelve years, and no acknowledgment given in respect thereof, the right to recover the same is barred by the statutes, and the rent is extinguished (*Howitt v. Earl of Harrington*, [1893] 2 Ch. 497).

## Quo Warranto.

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### NATURE AND HISTORY OF PROCEEDINGS QUO WARRANTO.

#### *The Old Writ of Quo Warranto.*—

The ancient mode of procedure against persons who usurped or exercised offices franchises, or liberties, in derogation of the rights or prerogatives of the Crown, from which all public franchises emanated, was by the prerogative writ of *Quo Warranto*.

The *Quo Warranto*, says Coke, is in the nature of the king's writ of right for franchises and liberties, wherein judgment final shall be given either against the king for the point adjudged, or for the king (2 *Inst.* 282). Again, Blackstone writes, a writ of *Quo Warranto* is in the nature of a writ of right for the king, against him who claims or usurps any office, franchise, or liberty, to inquire by what authority he supports his claim in order to determine the right. It lies also in case of non-user or long neglect of a franchise, or misuser or abuse of it; being a writ commanding the defendant to show



by what warrant he exercises such franchise, having never had any grant of it, or having forfeited it by neglect or abuse (3 Com. 262).

That the writ of *Quo Warranto* was of a considerable antiquity is evidenced by the fact that it is referred to by Bracton as if in general use in his time (see Bracton, *de Legibus*, lib. v. c. 4, fol. 372; see also Fleta, lib. v. c. 9). There is indeed a record of proceedings *Quo Warranto* in the reign of Richard I. (see *Abbreviato Placitorum*, p. 21 see also *Placita de Quo Warranto temporibus*, Edws. I., II., and III.).

#### *Information in the Nature of Quo Warranto.*—

The prerogative writ is now obsolete. Blackstone in explanation of its desuetude says: The judgment on a writ of *Quo Warranto*, being in the nature of a writ of right, is final and conclusive even against the Crown; which, together with the length of its process, probably occasioned that disuse into which it has now fallen, and introduced a more modern method of prosecution by information filed in the Court of King's Bench by the Attorney-General, in the nature of a writ of *Quo Warranto*, wherein the process is speedier and the judgment not quite so decisive. This is properly a criminal method of prosecution as well to punish the usurper by a fine for the usurpation of the franchise as to oust him or seise it for the Crown; but hath long been applied to the mere purpose of trying the civil right, seising the franchise, or ousting the wrongful possessor; the fine being nominal only (3 Com. 263).

Proceedings *Quo Warranto*, though based on the common law, were at an early period regulated by various statutes, notably by the Statute of Gloucester of 6 Edw. I., by a Statute of 18 Edw. I., and by other later Acts. With reference to these Statutes of *Quo Warranto*, as they have been termed, Coke, in commenting on the Statute of Gloucester, writes: "Regularly no man ought to answer for his freehold franchises or other thing without original writ *secundum lege terræ*, and the statutes to that end provided are but declarations of the ancient common law" (2 Inst. 282). As to the proceedings in the celebrated case of *Quo Warranto* against the city of London in the reign of Charles II., see *The Case of Quo Warranto touching the Charter of the City of London*, published 1696. Further information as to the antiquities of the subject which are beyond the scope of the present article, may be found in the Introduction to Tancred's work on *Quo Warranto*.

A valuable historical review of the jurisdiction in *Quo Warranto* is contained in the answer of Lord Chief-Justice Tindal to the question framed by the Lord Chancellor (Lord Brougham), on behalf of the House of Lords, for the opinion of the judges in the case of *Darley v. The Queen* (1846, 12 Cl. & Fin. at pp. 536 *et seq.*), in the course of which he says: The mode of proceeding by information in the nature of *Quo Warranto* came, no doubt, in the place of the ancient writ of *Quo Warranto*. This writ was brought for property of, or franchises derived from, the Crown. The earliest is to be found in the 9 Rich. I. (*Abbreviato Placitorum*, p. 21), and is against the incumbent of a church, calling on him to show *Quo Warranto* he holds the church. Then follow many others in the time of John, Henry II., and Edward I., for lands, for view of frankpledge, for return of writs, holding of pleas, free warren, pleinage, and prisage (*Abbreviato Brevium*, p. 210; 14 Edw. I.), emendation of assize of bread and beer, pillory and tumbril, and gallows. Some of these are offices or in the nature of offices, as in the instances of returns of writs and holding of Courts. The practice of filing informations of this sort by the Attorney-General in lieu of these writs is very ancient, and in Coke's *Entries* are many precedents of such informations against persons for usurping the same sort of franchises, as claiming to be a corporation, to have waifs, strays, holding a Court leet, Court baron, pillory and tumbril, markets, prison, or for usurping a public office, as conservator of the Thames and coal and corn meter. It is only in more modern times that informations have been exhibited by the king's coroner and attorney. The first reported case is that of *R. v. The Mayor, etc., of Hertford* (1 Raym. (Ld.) 426) in 10 Will. III. And it is a mistake to suppose that these informations were founded on the Statute of 9 Anne (see *R. v. Gregory*, 1772, 4 T. R. 240 n.; and *R. v. Williams*, 1757, 1 Burr. 402), when the right to file an information at common law by the Coroner and Attorney against a person for holding a criminal Court of record was recognised. After the Statute of 4 & 5 Will. & Mary, which restrained the filing of informations by the coroner and attorney, the sanction of the Court was required, and after that statute and the 9 Anne it exercised a discretion to grant or refuse them to private prosecutors according to the nature of the case. It has uniformly done so in cases under the Statute 9 Anne, c. 20 (see *R. v. Stacey*, 1785, 3 T. R. 1; *R. v. Trevenen*, 1819, 2 Barn. & Ald. 339).

*Classes of Informations Quo Warranto.*—Informations in the nature of *Quo Warranto* are of two classes, namely, (1) those which are filed on



behalf of the Crown by the Attorney-General or Solicitor-General *ex officio* without leave; and (2) those which are exhibited with leave of the Court by the Master of the Crown Office on behalf of some private individual, termed the relator, who is obliged to enter into a recognisance under 4 & 5 Will. & Mary, c. 18.

The provisions of the Statute 4 & 5 Will. & Mary, c. 18, requiring the leave of the Court to be obtained before the filing of informations at the Crown Office, and recognisances to be taken before the issue of process on any information, are referred to in the article on INFORMATIONS. These provisions apply also to informations in the nature of a *Quo Warranto*, though such informations are not specifically mentioned in the statute (see *R. v. The Mayor, etc., of Hertford*, 1700, 1 Salk. 376; *R. v. Morgan*, 1736, 2 Stra. 1042; *R. v. Howell*, 1736, Lee t. Hard. 247; *R. v. Marsden*, 1765, 3 Burr. at p. 1817; see also Crown Office Rules, 1886, r. 46; *R. v. Roberts*, 1831, 2 Barn. & Adol. 63).

*Quo Warranto Informations as to Corporate Offices.*—The most important class of informations in the nature of *Quo Warranto* exhibited at the relation of private individuals are those which relate to corporate franchises.

In cases where, as not unfrequently occurred, persons illegally intruded themselves into, and took upon themselves the execution of, offices of mayors, bailiffs, portreeves, and other offices within cities, towns, corporate boroughs, and places in England and Wales, it was found, where the offices were annual, very difficult, if not impracticable, under the earlier law, to bring to a trial and determination the right of such persons to the offices within the year; and when the offices were not annual, it was found difficult to try and determine the right of such persons to the offices before they had done acts in the offices "prejudicial to the peace, order, and good government, within such cities, towns, corporate boroughs, and places wherein they have respectively acted." And persons who had a right to such offices, or to be burgesses or freemen of such cities, etc., having either been illegally turned out of the same, or having been refused to be admitted or restored thereto, had in many cases no other remedy for obtaining admission or restoration to their offices or franchises than by writs of mandamus, the proceedings on which were very dilatory and expensive (see the preamble to 9 Anne, c. 25).

This being so, the Statute 9 Anne, c. 25, was passed "for rendering the proceedings upon informations in the nature of a *Quo Warranto* more speedy and effectual, and for the more easy trying and determining the rights of offices and franchises in corporations and boroughs."

The statute enabled informations in the nature of a *Quo Warranto* to be exhibited at the relation of any persons desiring to sue or prosecute the same against persons usurping, intruding into, or unlawfully holding and executing any of the said offices or franchises, and the proceedings thereon to be in such manner as was usual in cases of informations in the nature of a *Quo Warranto* (see *ibid.* s. 4). It was also provided that in case any person against whom any information in the nature of a *Quo Warranto* had in any of the said cases been exhibited should be found guilty of a usurpation or intrusion into or unlawfully holding and executing any of the said offices or franchises, a fine might be imposed on him, as well as judgment of ouster against him.

Under the same statute also the costs of the prosecution may be awarded to the relators, and if judgment be given for the defendants they may recover their costs against the relators (see *ibid.* s. 5).

It is important to observe that the provisions of the statute are



applicable only to corporate offices in corporate places (see *R. v. McKay*, 1826, 5 Barn. & Cress. at p. 646).

The Act is meant to extend to all officers of corporations as such, but it does not extend generally to all offices or franchises exercised without authority from the Crown within a corporation; it was meant to be confined to such franchises as were claimed in instances affecting those rights between party and party (per Lord Mansfield, C.J., *R. v. Williams*, 1757, 1 Burr. at p. 407). And it has been said that the Legislature had in their mind the offices of municipal corporations properly so called; the statute has, indeed, been extended to offices of a corporate character, though not in a municipal corporation, but it does not extend to offices of a quasi-corporate character where there is no municipal corporation, such, for example, as the office of member of a local board of health in a non-corporate district (see per Cockburn, C.J., *R. v. Backhouse*, 1867, 7 B. & S. at p. 920).

The chief class of cases in which proceedings *Quo Warranto* have of recent times been made use of is the usurpation of offices and franchises in corporations, applications for informations *Quo Warranto* in other cases being comparatively rare.

But since the provisions of the Municipal Corporations Act, 1882, substituting an election petition instead of proceedings *Quo Warranto* as a means of questioning elections under the Act (*i.e.* elections to the offices of mayor, alderman, councillor, elective auditor, or revising assessor) on the ground of any disqualification existing at the date of the election, applications for informations in the nature of *Quo Warranto* to try the right to offices and franchises in corporations are much less frequent than they used to be before the Act (see *post* under the head *Election Petition in lieu of Quo Warranto*). The practice relating to informations concerning corporate offices and franchises differs materially in many respects from that relating to other *Quo Warranto* informations.

*Quo Warranto Informations ex officio.*—In certain cases leave will not be granted to a private relator to exhibit an information in the nature of a *Quo Warranto*, but an information can only be filed by the Attorney-General *ex officio*.

For instance, leave to file an information *Quo Warranto* at the relation of a private person against a corporation as a body will not be granted (see *R. v. The Corporation of Carmarthen*, 1759, 2 Burr. 869), and an information in the nature of a *Quo Warranto* against a corporation as a body to show by what authority they claim to act as a corporation can be filed only by the Attorney-General *ex officio* (see *R. v. Ogden*, 1829, 10 Barn. & Cress. 230; see also *R. v. Taylor*, 1840, 11 Ad. & E. 949). Nor will the Court grant a *Quo Warranto* information against an individual to try the legality of a charter of incorporation (see *R. v. Jones*, 1863, 8 L. T. N. S. 503). The Court will not grant an information *Quo Warranto* for private usurpation of a franchise; in such case the proper remedy is to apply to the Attorney-General (see *Ibbotson's case*, 1736, Lee t. Hard. 261; see also *R. v. Ogden*, cited *supra*). When a body, whether corporate or not, is created by the Legislature for public purposes, and the statutory powers of that corporation are usurped, no information can be exhibited by a private relator; the only remedy is by intervention of the Attorney-General (see *R. v. Staples*, 1867, 9 B. & S. at p. 929, *n.*).

CASES IN WHICH QUO WARRANTO IS APPLICABLE.—*General.*—Informations in the nature of *Quo Warranto* may, as has already been generally



stated, be exhibited at the instance of a private relator against any persons usurping any office, franchise, liberty, or privilege belonging to the Crown, so that the authority by which they claim to exercise such office or franchise may be legally tested and determined.

It was laid down by Lord Kenyon, C.J., that the Court will not extend the remedy by information beyond the limits prescribed by the old writ of *Quo Warranto*, and, as that could only be prosecuted for an usurpation on the rights or prerogatives of the Crown, so an information in the nature of a *Quo Warranto* can only be granted in such cases (see *R. v. Shepherd*, 1791, 4 T. R. 381).

This statement of the jurisdiction must be taken as supplemented by the more recent decisions which are referred to in the ensuing paragraphs.

*Offices.*—It is now well settled that proceedings by information in the nature of *Quo Warranto* will lie for usurping any office, whether created by charter of the Crown alone, or by the Crown with the consent of Parliament, provided the office be of a public nature and a substantive office, and not merely the function or employment of a deputy or servant at the will and pleasure of others; for with respect to such an employment the Court certainly will not interfere, and the information will not properly lie (see *Darley v. R.*, 1846, 12 Cl. & Fin. 520). In applying these principles it was held that the office of treasurer of the public money of the county of the city of Dublin is an office for which an information in the nature of a *Quo Warranto* will lie (*ibid.*).

The decision of the House of Lords in *Darley v. R.* laid down distinctly the principles upon which it is to be determined whether or not any particular office is such a one as to make procedure by *Quo Warranto* applicable with regard to it. These principles are now invariably followed (see, for instance, per Lord Coleridge, C.J., *Ex parte Parry*, 1887, 3 T. L. R. 649).

It was formerly held that *Quo Warranto* was a remedy applicable only where there had been a usurpation directly on the rights of the Crown (see, per Patteson, J., *R. v. The Guardians of the Poor of St Martins-in-the-Fields*, 1851, 17 Q. B. at p. 160). But it is now decided that *Quo Warranto* lies for an office though not immediately derived from the Crown; if it be so mediately, as, for example, where commissioners are empowered by Act of Parliament to direct that such office be created, if it be an independent substantive office, and if it be of a public nature (see *ibid.*; 17 Q. B. 149).

It is impossible here to enumerate all the offices which very numerous decisions have determined to be public offices, so that informations in the nature of *Quo Warranto* may be exhibited in respect of them. It will be of use, however, to specify some of the more important offices which have been the subject of express decision. For example, *Quo Warranto* informations will lie in respect of the offices of—

Mayor (*R. v. M'Gowan*, 1840, 11 Ad. & E. 869; *R. v. Dixon*, 1850, 15 Q. B. 33); Alderman (*R. v. Harvey*, 1842, 3 Q. B. 475; *R. v. Bradley*, 1861, 3 El. & El. 634); Sheriff of a borough (*R. v. Whitwell*, 1792, 5 T. R. 85); Town Councillor (*R. v. Ireland*, 1868, L. R. 3 Q. B. 130); Recorder (*R. v. Mayor, etc., of Colchester*, 1788, 2 T. R. 259); County Court Judge (*R. v. Parham*, 1849, 13 Q. B. 858); High Bailiff of a County Court (*R. v. Dyer*, 1849, 13 Q. B. 851); Coroner of a county or borough (*R. v. Diplock*, 1868, 10 B. & S. 174; *R. v. Grimshaw*, 1847, 10 Q. B. 747); Governor of a gaol (*R. v. Lancaster*, 1847, 10 Q. B. 962); Chief Constable (*R. v. Ragsdale*, 1734, 5 T. R. 376 n.; *R. v. Watkinson*, 1839, 10 Ad. & E. 288); Freeman (*R. v. Pepper*, 1838, 7 Ad. & E. 745); Burgess (*R. v. Warlow*, 1813, 2 M. & S. 75); Master of a city company (*R. v. Bumstead*, 1831, 2 Barn. & Adol. 699; *R. v. Attwood*, 1833, 4 Barn. & Adol. 481); Member of a Local Board of Health (*R. v. Collins*, 1876, 2 Q. B. D. 30; *R. v. Cooban*, 1886, 56 L. J. M. C. 33); Member of a School Board (*R. v. Turmine*, 1878, 4 Q. B. D. 79); Member of the General



Council of Medical Education (*R. v. Storrar*, 1859, 2 El. & El. 133); Justice of the Peace (*R. v. Patteson*, 1832, 4 Barn. & Adol. 9); Clerk of the Peace (*R. v. Russell*, 1869, 10 B. & S. 91); Poor Law Guardian (*R. v. Rawlins*, 1884, 14 Q. B. D. 325; *R. v. Hampton*, 1865, 6 B. & S. 923); Clerk of a Board of Guardians (*R. v. Griffiths*, 1851, 17 Q. B. 164); Clerk of a School Board (*R. v. Dibbin*, 1884, 14 Q. B. D. 372); Vestryman under the Metropolis Management Act, 1855 (*R. v. Soutter*, [1891] 1 Q. B. 57); Vestry Clerk (*R. v. Burrows*, [1891] 1 Q. B. 399).

In order to make proceedings by *Quo Warranto* applicable in the case of a non-corporate office such as that of vestry clerk, there must be some user of the office, something more than mere acceptance of the office. So where a person while holding the office of churchwarden was proposed for the office of vestry clerk and declared elected, and he published a letter of thanks to the electors, but never acted as vestry clerk, it was held on an application for an information in the nature of *Quo Warranto* on the ground that the office of vestry clerk was incompatible with that of churchwarden, that what the defendant had done was not such an exercise of the office of vestry clerk as to render the remedy by *Quo Warranto* applicable (see *R. v. Tidy*, [1892] 2 Q. B. 179; see also *R. v. Jones*, 1873, 28 L. T. N. S. 270).

In the case of a corporate office, the old rule is that the existence of the three circumstances of election, acceptance, and admission is enough to make the remedy by *Quo Warranto* applicable (see, per Wright, J., *R. v. Tidy*, [1892] 2 Q. B. at p. 180).

*Franchises.*—Franchises are such branches of the prerogative or royal privileges as subsist in the hands of a subject. In theory of the common law all franchises are derived from royal grant in virtue of the royal prerogative, but in many cases they may be and are claimed by prescription (see 2 Black. Com. 37; 2 Coke, *Inst.* 281; Williams, *Rights of Common and other Prescriptive Rights*, p. 2; Cruise, *Digest*, vol. iii. p. 266; see also the articles FRANCHISE; PRESCRIPTION).

From the characteristic of a franchise that it is a royal privilege subsisting in the hands of a subject, it followed that the Crown had prerogative power where a franchise was exercised by a subject to call upon him to show by what authority he exercised it. This power of course is still in existence, and is capable of being enforced by informations *Quo Warranto*. Some branches of the learning with regard to franchises, however, are of little more than historic interest at the present time, though certain branches of it are still of living importance.

Proceedings *Quo Warranto* will lie in respect of the usurpation or abuse of a franchise or liberty (see 2 Coke, *Inst.* 282, *ibid.* 496). Such franchises, for instance, as waifs, estrays, a park, warren, wreck of the sea, a fair, market, toll, choosing certain officers, such as bailiff, coroner, constable, etc., holding certain Courts, such as Courts leet, etc. (see *Placita de Quo Warranto*, temp. Edws. I., II., and III.; Coke, *Entries*, tit. "*Quo Warranto*"; Comyns, *Digest*, tit. "*Quo Warranto*"; Tancred on *Quo Warranto*).

A *Quo Warranto* information will also lie in cases of non-user or long neglect of a franchise or misuser or abuse of a franchise (see, for instance, *R. v. The Mayor, etc., of Hertford*, 1699, 1 Salk. 374; *Peter v. Kendal*, 1827, 6 Barn. & Cress. at p. 710).

But a *Quo Warranto* information will not be granted against persons for usurping a franchise of a mere private nature not connected with the Government (see, per Bayley, J., *R. v. Ogden*, 1829, 10 Barn. & Cress. at p. 233; *Sir William Lowther's case*, 1725, 2 Raym. (Ld.) 1409; *Ibbotson's case*, 1736, Lee t. Hard. 261).



JURISDICTION IN QUO WARRANTO DISCRETIONARY.—The jurisdiction, in granting or refusing an information *Quo Warranto* to be filed at the instance of a private relator, is indeed in every case discretionary. The Court are bound to consider all the circumstances of each case, and may refuse an application on the ground of the length of time during which the defendant has been in undisturbed possession of the office or franchise (see per Lord Mansfield, C.J., *R. v. Stacey*, 1785, 1 T. R. at p. 2). And it must be recollected that the cases in which there has been a refusal to allow an information to be filed are not necessarily authorities against the validity of an information when filed, because in the cases of refusal the Courts may have proceeded on the ground that the circumstances were not such as to call for their interference (see *Darley v. R.*, 1845, 12 Cl. & Fin. at p. 538), for even if the office as to which an information is applied for is one in respect of which *Quo Warranto* would lie, the Court still has to exercise its discretion in granting or refusing it (see, for example, per Cockburn, C.J., *Bradley v. Sylvester*, 1871, 25 L. T. at p. 460).

With regard to the discretionary jurisdiction, it was said by Lord Blackburn, that ever since the Statute 4 & 5 Will. & Mary, c. 18, s. 2, the Court has had a discretion to exercise as to allowing an information in the nature of a *Quo Warranto* to be filed by the Master of the Crown Office. That discretion has especially been exercised in the case of annual offices. The rule always acted upon is that if the right person has been elected, and it is not shown that anyone else has been kept out, nor the result of the election in any way affected, the Court will not allow the information to be filed; but if a real question arises in a case in which the result of the election is affected by the mode adopted, it may properly come before the Court for decision (see *R. v. Cousins*, 1873, L. R. 8 Q. B. 216; see also *R. v. The Rector, etc., of St. Mary's, Lambeth*, 1838, 8 Ad. & E. 356; *R. v. Ward*, 1873, L. R. 8 Q. B. 210).

It must be recollected also that in some cases an information can only be filed *ex officio* by the Attorney-General, and leave would be refused to a private relator (see *ante*, under the head *Quo Warranto Information ex officio*).

Moreover, under some circumstances mandamus, and not *Quo Warranto* information, is the appropriate remedy. The rule appears to be that when the office or franchise is in the *de facto* possession or user of the party, the proper procedure is by *Quo Warranto*. In *R. v. Phippen* (1838, 7 Ad. & E. at p. 970), Lord Denman, C.J., stated that the regular practice was that where an office is full there cannot be a new election without a *Quo Warranto* information to determine the title (see also *R. v. The Mayor, etc., of Winchester*, 1837, *ibid.* 215). And even where the party has resigned the office, an information *Quo Warranto* may be granted to try the right (see *R. v. Warlow*, 1813, 2 M. & S. 75). On the other hand, where the office is not full, as when the election was merely colourable, the proper remedy is by mandamus to swear in the applicant or to proceed to a new election (see *R. v. The Mayor, etc., of Leeds*, 1841, 11 Ad. & E. 512). See also the article MANDAMUS.

There is a recent instance of an injunction to restrain being granted under circumstances which would support an information in the nature of a *Quo Warranto*. When a member of a School Board had been improperly declared disqualified for the office, on application he obtained an injunction from the Chancery Division restraining the Board from proceeding to elect a new member in his place, notwithstanding that apparently he had a remedy at law by *Quo Warranto*. The injunction was granted on the ground



that where, independently of the Judicature Act, 1873, s. 25 (8), there is a legal right which can be asserted either at law or in equity, a Court of equity has jurisdiction under that section to grant an injunction in protection of that right (*Richardson v. Methley School Board*, [1893] 3 Ch. 510).

**ELECTION PETITION IN LIEU OF QUO WARRANTO.**—The Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), to a great extent substitutes procedure by election petition for the procedure by information in the nature of a *Quo Warranto*, which formerly was the only mode of testing the validity of municipal elections.

A municipal election, that is an election to the corporate office of mayor, alderman, councillor, elective auditor, or revising assessor (see *ibid.* s. 7), may be questioned by an election petition on the following grounds:—(1) That the election was as to the borough or ward wholly avoided by general bribery, treating, undue influence or personation; or (2) that the election was avoided by corrupt practice or offences against Part IV. of the Municipal Corporations Act, 1882, committed at the election; or (3) that the person whose election is questioned was at the time of the election disqualified; or (4) that he was not duly elected by a majority of lawful votes (*ibid.* s. 87 (1)). But a municipal election cannot be questioned on any of these grounds except by an election petition (*ibid.* s. 87 (2); see **ELECTION PETITION**). In such cases, therefore, a *Quo Warranto* information is not now applicable.

An information *Quo Warranto* is still, however, available against the holder of a corporate office who becomes disqualified *after election*. But an application for an information in the nature of a *Quo Warranto* against any person claiming to hold a corporate office cannot be made after the expiration of twelve months from the time when he becomes disqualified after election (see *ibid.* s. 225).

Certain statements in the judgments of the House of Lords in *Pritchard v. The Mayor, etc., of Bangor*, 1888, 13 App. Cas. 241, appear to suggest that proceedings by *Quo Warranto* will not now lie against the holder of any corporate office in any case, except only where he becomes disqualified after election. But the Municipal Corporations Act, 1882, itself appears to contemplate the continued possibility of procedure by *Quo Warranto* in certain cases by providing that every municipal election not called in question within twelve months after election, either by election petition or by information in the nature of a *Quo Warranto*, shall be deemed to have been to all intents a good and valid election (s. 73).

There is a recent decision of considerable importance as to the effect of the right to petition upon the applicability of proceedings in the nature of *Quo Warranto*. Where the mayor of a borough presided at an election of an alderman for the borough, there being two candidates, one of whom was the mayor himself, and he voted for himself, thereby causing an equality of votes, whereupon he gave the casting vote in his own favour, and declared himself elected, an application was made for a *Quo Warranto* to question his right to act as alderman. It was held that, assuming that he was improperly elected, the case was one in which either the person whose election was questioned was at the time of the election disqualified, or he was not duly elected by a majority of lawful votes within the meaning of sec. 87 of the Municipal Corporations Act, 1882, and in either case the election could not be questioned except by an election petition, and *Quo Warranto* would not lie (*R. v. Morton*, [1891] 1 Q. B. 39). In that case, Smith, J., in his judgment (*ibid.* at p. 41) said: "It is not necessary to hold, and I do not



hold, that in no case will proceedings by way of *Quo Warranto* lie, excepting in the case of disqualification arising after election." It is, however, clear that proceedings by way of *Quo Warranto* are abolished by sec. 87 of the Municipal Corporations Act, 1882, in cases which come within that section; or, in other words, where a petition will lie, *Quo Warranto* will not.

The Municipal Corporations Act, 1882, Part IV. is, by sec. 36 of the Municipal Elections (Corrupt and Illegal Practices) Act, 1884, extended so as to apply to elections to the offices of member of Local Board, member of Improvement Commissioners, Poor Law Guardian, and member of School Board (see CORRUPT PRACTICES; ILLEGAL PRACTICES; ELECTION PETITION; ELECTIONS). By sec. 87 of the Act of 1882, as pointed out above, a municipal election can be questioned by an election petition only on certain grounds therein specified, and not on any other ground. The result, therefore, is that any such election can be attacked on the specified grounds by an election petition only; but an information in the nature of a *Quo Warranto* is still the appropriate remedy for testing the validity of an election on any ground not within the section, such, for instance, as disqualification arising after the election (see, for example, *R. v. Cooban*, 1886, 56 L. J. M. C. 33). As to the application of the Municipal Corporations Act, 1882, to County Council elections, and to Parish Council elections and other elections under the Local Government Act, 1894, see the article ELECTION PETITION.

It may be added that where the Legislature creates any new body to be elected by popular suffrage, if no mode is pointed out by the statute creating the body as to how the validity of the election is to be determined, then the Queen's Bench Division would be the proper tribunal by means of an information in the nature of a *Quo Warranto* (see, per Mellish, L.J., *R. v. Collins*, 1876, 2 Q. B. D. at p. 35).

OTHER CASES IN WHICH QUO WARRANTO WILL NOT LIE.—*Offices held at will*.—Proceedings by *Quo Warranto* will not lie in respect of the function or employment of a deputy or servant held at the will and pleasure of others, it not being an office of a public or substantive nature (see, for example, *R. v. The Corporation of the Bedford Level*, 1805, 6 East, 356; *R. v. The Justices of Herefordshire*, 1819, 1 Chit. 700; see also, per Tindal, C.J., *Darley v. R.*, 1846, 12 Cl. & Fin. at p. 542).

In any case where an office is held by a servant or other person at the will of the person in whose employment he is, or if the office is a statutory one, and the officer is removable at the pleasure of other persons, or if the office is merely a temporary one, an information *Quo Warranto* will not lie. On this principle it has been held that the offices of clerk of Land Tax Commissioners (*R. v. Thatcher*, 1822, 1 Dow. & Ry. 426); overseers (*R. v. Carpenter*, 1837, 1 Nev. & P. at p. 774); churchwarden (*In re Barlow*, 1861, 30 L. J. Q. B. 271); clerk to a Local Board of Health (*Ex parte Richards*, 1878, 3 Q. B. D. 368); clerk to a School Board, the office being held at the pleasure of the Board (*Bradley v. Sylvester*, 1871, 25 L. T. N. S. 459); clerk to the justices of a borough (*R. v. Fox*, 1858, 8 El. & Bl. 939); registrar of births and deaths (*Ex parte Parry*, 1887, 3 T. L. R. 649), cannot be the subject of *Quo Warranto* informations.

So in a recent case it has been held that an information in the nature of a *Quo Warranto* will not lie in respect of the office of treasurer to a district council, his duties not being of that "public and substantive" character which are required to support a *Quo Warranto* (*R. v. Wells*, 1895, 43 W. R. 576).



*Offices in Charitable Institutions.*—*Quo Warranto* informations are not applicable to any office of a charitable institution, even though it is regulated by charter or private Act of Parliament, such as the office of master of a grammar school (*R. v. Mousley*, 1846, 8 Q. B. 946), or the fellowship of a college, though this is somewhat doubtful (see *R. v. Gregory*, 1772, 4 T. R. 240, note; see also *R. v. St. Catherine's Hall*, 1791, *ibid.* 233), or, in fact, any office in a society of a purely eleemosynary kind (see *Ex parte Smith*, 1863, 8 L. T. N. S. 458).

For the same reason, also, the office of surgeon or physician to a hospital founded by a private individual for the relief of the poor, which was without endowment, and which was afterwards incorporated by Act of Parliament, which placed it under the management of governors, and provided for the appointment of medical and surgical officers, has been held not to be an office the right to hold which can be inquired into by *Quo Warranto* (*R. v. Anchinleck*, 1891, L. R. Ir. Q. B. D. 404).

*Claim to Office without Possession or User.*—*Quo Warranto* will not lie in the case of a claim to an office or franchise, unless the party is in actual possession of the office or franchise claimed. A mere claim without any user would not support a *Quo Warranto* information (see *R. v. Whitwell*, 1792, 5 T. R. 85). On this ground it has recently been held that an information in the nature of a *Quo Warranto* will not lie against a vestryman who has ceased to be qualified, unless there is evidence that he has acted as a vestryman since being disqualified, so as to have made himself liable to penalties (*R. v. Williams*, 1894, 64 L. J. M. C. 34).

In the same way, also, the Court will not usually allow an information *Quo Warranto* to be exhibited against a person in respect of an office which he has ceased to hold; but this rule is not without exception (see *R. v. Warlow*, 1813, 2 M. & S. 75; *R. v. Morton*, 1843, 4 Q. B. 146; *R. v. Blizzard*, 1866, L. R. 2 Q. B. 58).

PROCEDURE ON INFORMATION QUO WARRANTO.—*General.*—The proceedings under the old writ of *Quo Warranto* were civil proceedings, involving ouster of the party usurping the franchise, and in some cases seizure of the franchise into the hands of the Crown (see *R. v. Stanton*, 1606, Cro. Jac. 259; *R. v. Mayor of London*, 1691, Show. at p. 280; *Sir James Smith's case*, 1691, 4 Mod. 58; *R. v. The Mayor, etc., of Hertford*, 1698, 1 Salk. 374).

When, however, procedure by means of information in the nature of a *Quo Warranto* was substituted for the writ, the proceedings were at first deemed to be criminal, as they involved fine or imprisonment in addition to the ouster.

But for a considerable time proceedings by *Quo Warranto* at the instance of private relators have been considered merely in the nature of civil proceedings for the determination of a question of right (see *R. v. Francis*, 1788, 2 T. R. 484).

It is now, moreover, expressly provided by the Judicature Act, 1884, 47 & 48 Vict. c. 61, s. 15, that proceedings in *Quo Warranto* are to be deemed to be civil proceedings, whether for purposes of appeal or otherwise.

As to the procedure on informations generally, see the article INFORMATIONS; the Crown Office Rules, 1886; and Short and Mellor's *Crown Office Practice*, 1890; see also the articles, ACTIONS IN THE HIGH COURT; APPEALS; EXECUTION; MANDAMUS; PLEADINGS, etc.

It is proposed here merely to indicate such rules of practice as relate exclusively to *Quo Warranto* informations.



*Application for Information Quo Warranto.*—Under the Crown Office Rules, 1886 (r. 51), every application for an information in the nature of a *Quo Warranto* must be made by motion to a Divisional Court for an order *nisi*, unless it be *ex officio*, or be made in respect of a corporate office within the meaning of the Municipal Corporations Act, 1882, 45 & 46 Vict. c. 50, s. 225.

The granting or refusing of an application by a private relator for an information in the nature of a *Quo Warranto*, as has been before mentioned, is entirely in the discretion of the Court.

As to the procedure on *ex officio* informations by the Attorney-General, see the article INFORMATION.

The application for an information in the nature of a *Quo Warranto* in respect of a corporate office within the meaning of the Municipal Corporations Act, 1882, s. 225, must be by notice of motion to the person affected thereby, which is to be served not less than ten days before the day specified in the notice for making the application (C. O. R. 1886, r. 52). Such notice must set forth the name and description of the applicant, and a statement of the grounds of the application, and the applicant must deliver with the notice, on service thereof, a copy of the affidavits whereby the application will be supported (*ibid.* r. 53). For form of notice of motion for an information *Quo Warranto* for a corporate office within the Municipal Corporations Act, 1882, see Crown Office Rules, 1886, Form No. 34.

When notice of an application for an information in the nature of a *Quo Warranto* has been given under sec. 225 of the Municipal Corporations Act, 1882, against a person claiming to hold a corporate office, the person giving such notice is responsible for costs incurred thereby, even though the application is abandoned before it can be heard (see *Ballard v. Halliwell*, 1896, 65 L. J. Q. B. 332).

No order for filing any information in the nature of a *Quo Warranto* will be granted unless at the time of moving an affidavit be produced by which some person deposes on oath that the motion is made at his instance as relator; and he is to be deemed to be the relator in case the order is made absolute, and is to be named as relator in the information in case it be filed, unless the Court otherwise orders (*ibid.* r. 54). The affidavit must show that the relator has a sufficient interest in the election (see *R. v. Thirlwind*, 1864, 33 L. J. Q. B. 171).

Every objection intended to be made to the title of a defendant on an information in the nature of a *Quo Warranto* must be specified in the order to show cause or notice of motion, and no objection not so specified may be raised by relator on the pleadings without the special leave of the Court or a judge (*ibid.* r. 55; see also *R. v. Slythe*, 1827, 6 Barn. & Cress. 240).

*Form of Information Quo Warranto.*—Forms of information *Quo Warranto* against a member of School Board and against Municipal Corporate officers are given in the Appendix to the Crown Office Rules, 1886 (Forms 32 and 33), and as the forms themselves afford a valuable insight into the nature and scope of proceedings *Quo Warranto*, it is thought well to set them forth below.

FORM OF INFORMATION QUO WARRANTO AGAINST A MEMBER OF A SCHOOL BOARD.

Cheshire, to wit.

Be it remembered that \_\_\_\_\_, Esquire, coroner and attorney of our present Sovereign Lady the Queen, in the Queen's Bench Division of Her Majesty's High Court of Justice, before the Queen herself, who for our said Lady the Queen in this behalf prosecutes, in his own proper person comes here into Court before



the Queen herself, at the Royal Courts of Justice, London, on the \_\_\_\_\_ day of \_\_\_\_\_, in the year of our Lord one thousand eight hundred and \_\_\_\_\_, and for our Lady the Queen, at the relation of A. B. of \_\_\_\_\_, according to the form of the statute in such case made and provided, gives the Court here to understand and be informed that [*the parish of \_\_\_\_\_, in the County of \_\_\_\_\_, is a school district within the meaning of the Elementary Education Acts, 1870 and 1873. And that within the said parish and school district of \_\_\_\_\_, pursuant to the provisions of the said Acts, divers, to wit, nine members [or as the case may be] are to be elected for and as the School Board for the said parish and school district, in manner by the said Acts provided, and in accordance with the rules, orders, and regulations of the Lords of the Committee of the Privy Council on Education in that behalf dated (the third day of October, one thousand eight hundred and seventy-three), and that the place and office of [member of the School Board of the said parish and school district] is a public office and place of great trust and pre-eminence within the said [parish and school district], touching the rule and government of the said [school district], that is to say, at the [parish] of \_\_\_\_\_, in the county aforesaid. And that C. D. of \_\_\_\_\_, in the said county [merchant, or as the case may be] heretofore, to wit, on the \_\_\_\_\_ day of \_\_\_\_\_, in the year of our Lord one thousand eight hundred and eighty-six, at the [parish] aforesaid, in the county aforesaid, did use and exercise, and from thence continually afterwards to the time of exhibiting this information has there used and exercised, and still does there use and exercise, without any legal warrant, authority, or right whatsoever, the office of [member of the school board of the said parish and school district of \_\_\_\_\_], in the county aforesaid, and for and during all the time last above mentioned, has there claimed, and still does claim, to be a [member of the said school board of the said parish and school district], and to have, use, and exercise all the privileges, and perform all the duties belonging and appertaining to the said office of [member of the said school board], which said offices, privileges, and duties he, the said C. D., for and during all the time last above mentioned, upon our said Lady the Queen without any legal warrant, authority, or right whatsoever has usurped, and still does usurp, that is to say, at the [parish] of \_\_\_\_\_, in the county aforesaid, in contempt of our Lady the Queen, to the great damage and prejudice of her royal prerogative, and against her Crown and dignity. Whereupon the said coroner and attorney of our said Lady the Queen, for our said Lady the Queen, prays the consideration of the Court here in the premises. And that due course of law may be awarded against him, the said C. D., in this behalf to make him answer to our said Lady the Queen, and show by what authority he claims to have, use, and enjoy, and perform the office, liberties, privileges, and duties aforesaid.*

(Signed)

(Queen's Coroner and Attorney).

## FORM OF INFORMATION QUO WARRANTO AGAINST MUNICIPAL CORPORATE OFFICERS.

Borough of \_\_\_\_\_, to wit.

Be it remembered that, etc. [*proceed as in the last form*]

That the borough [*or city*] of \_\_\_\_\_ is a borough subject to the provisions of the Municipal Corporations Act, 1882 [*if subject to the provisions of any other Act, it should be stated*], and that within the said borough [*or city*], pursuant to the provisions of the said Act, there of right ought to be one mayor, [*six*] aldermen, and [*eighteen*] councillors, to be elected in the manner in the said Act specified; and that the place and office of [mayor], [alderman], [*or a councillor*] of the said borough is a public office, and a place and office of great trust and pre-eminence within the said borough, touching the rule and government of the said borough [*and the administration of public justice within the same*], that is to say, at the borough of \_\_\_\_\_, in the said county. And that C. D. of the borough aforesaid, in the county aforesaid [*merchant*] heretofore, to wit, on the \_\_\_\_\_ day of \_\_\_\_\_, in the year of our Lord one thousand eight hundred and eighty-six, at the borough of \_\_\_\_\_ aforesaid, in the county aforesaid, did use and exercise, and from thence continually afterwards to the time of exhibiting this information has there used and exercised, and still does there use and exercise, without any legal warrant, royal grant, or right whatsoever, the office of \_\_\_\_\_ of the said borough, and for and during all the time last above mentioned had there claimed, and still does there claim, without any legal warrant, royal grant, or right whatsoever, to be \_\_\_\_\_ of the said borough, and to have, use, and enjoy all the liberties, privileges, and franchises, to the office of \_\_\_\_\_ of the said borough, belonging and appertaining, which said office, liberties, privileges, and franchises he, the said C. D., for and during all the time last above mentioned, upon



our said Lady the Queen, without any legal warrant, royal grant, or right whatsoever, has usurped, and still does usurp, that is to say, at the borough of aforesaid, in the county aforesaid, in contempt of our said Lady the Queen, to the great damage and prejudice of her royal prerogative, and also against her Crown and dignity. Whereupon the said coroner and attorney of our said Lady the Queen, for our said Lady the Queen, prays the consideration of the Court here in the premises. And that due process of law may be awarded against him, the said *C. D.*, in this behalf to make him answer to our Lady the Queen, and show by what authority he claims to have, use, and enjoy the office, liberties, privileges, and franchises aforesaid.

(Signed)

(*Queen's Coroner and Attorney*).

As to the practice with regard to the drawing up and filing the information, and as to the recognisance, see *INFORMATIONS*.

A new relator may, by leave of the Court on notice of motion, be substituted for the one who first enters into the recognisances on special circumstances being shown (*C. O. R.* 1886, r. 57).

*Discharge of Order Nisi.*—

The Court may discharge an order *nisi* for an information in the nature of a *Quo Warranto* with or without costs, and in its discretion may, upon such notice as may be just, direct the costs to be paid by the solicitor or other parties joining in the affidavits, in support of the application, although he be not the proposed relator (*ibid.* r. 56).

*Consolidation.*—

Where several orders *nisi* for informations in the nature of *Quo Warranto* have been granted against several persons for usurpation of the same offices, and all upon the same grounds of objection, the Court may order such orders to be consolidated, and only one information to be filed in respect of all of them, or may order all proceedings to be stayed upon all but one, until judgment be given in that one, provided that no order be made to consolidate or stay any proceedings against any defendant, unless he give an undertaking to disclaim if judgment be given for the Crown upon the information which proceeds (*ibid.* r. 58).

*Disclaimer.*—

If a defendant on an information in the nature of a *Quo Warranto* does not intend to defend, he may, to prevent judgment by default, enter a disclaimer at the Crown Office Department, and file a copy there, and deliver another copy to the relator or his solicitor. Upon the disclaimer being filed, judgment of ouster may be entered at the Crown Office, and the costs taxed, as in judgment by default (*ibid.* r. 69; for form of disclaimer, see *ibid.* Form No. 35; and for judgment of ouster on disclaimer, *ibid.* Form No. 36).

*Pleadings and Subsequent Proceedings.*—

Where any information in the nature of a *Quo Warranto* has been filed, the defendant may plead to such information within such time, and in like manner as if the information were a statement of claim delivered in an action, and, subject to the Crown Office Rules, 1886, this pleading, and all subsequent proceedings, including pleadings, trial, judgment, and execution, are to proceed, and may be had and taken as if in an action; and where the judgment is for the relator, judgment of ouster may be entered for him in all cases (*ibid.* r. 134).

*Limitation.*—

In the case of corporate offices or franchises, the defendant may raise the plea that he has held the office or franchise for six years; and it is now provided by the Crown Office Rules (following the Statute 32 Geo. III. c. 58, which was repealed by the Statute Law Revision Act, 1887, 50 & 51 Vict. c. 59) that the prosecutor, in answer to a plea that the defendant has held and executed the office or franchise for six years before exhibiting the information, may reply any forfeiture, surrender, or avoidance by the defendant within the said six years (*ibid.* r. 135).



It should be recollected also that an information in the nature of a *Quo Warranto* to question any municipal election must be filed within twelve months after the election (see the Municipal Corporations Act, 1882, s. 225, which has been referred to *ante*, under the head of *Election Petition in lieu of Quo Warranto*).

[*Authorities*.—Coke, *Entries*, 1614, tit. “*Quo Warranto*”; *The Pleadings, Arguments, and other Proceedings in the Court of King’s Bench upon the Quo Warranto touching the Charter of the City of London*, 1696; *Placita de Quo Warranto temp.* Edws. I., II., and III., published by the Record Commissioners, 1818; Comyns, *Dig.*, 5th ed., 1822, tit. “*Quo Warranto*”; Willcock, *Municipal Corporations*, ch. iii., “*Quo Warranto and Informations in the Nature of Quo Warranto*,” 1827; Tancred, *Treatise on Informations in the Nature of a Quo Warranto*, 1830; Cole, *Criminal Informations and Informations in the Nature of a Quo Warranto*, 1843; Shortt on *Informations Criminal and Quo Warranto*, 1888; Short and Mellor, *Crown Office Practice*, ch. viii., “*Informations Quo Warranto*.”]

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**Rabbits.**—These animals are not in the strict sense game, but are subject to some of the enactments treated under the head GAME LAWS, vol. vi. p. 36; and see GROUND GAME.

If domesticated they are within the Prevention of Cruelty to Animals Acts, but not if caught wild with a view to coursing (*Aplin v. Porritt*, [1893] 2 Q. B. 57).

As beasts of warren they may be kept freely on land over which a right of free warren exists (*Bowlston v. Hardy*, Cro. (1) 547); but persons who bring a stock of rabbits on other lands are liable for the damage done (1) either to the occupier (*Hilton v. Green*, 2 F. & F. 821), who can also keep them down under the Ground Game Act, 1880, or (2) to adjoining owners or occupiers (*Farrer v. Nelson*, 1885, 15 Q. B. D. 258; and see Warry on *Game Laws*, 52–56; Beven, *Negligence*, 2nd ed., 650).

**Rabies.**—See DOGS.

**Race.**—As to jurisdiction of referee, see *Sadler v. Smith*, 1869, L. R. 5 Q. B. 40. As to recovery of stakes, irregularity in race, and construction of club rules, see *Dines v. Wolfe*, 1869, L. R. 2 P. C. 280.

**Race-Course.**—See HORSES, vol. vi. at p. 225.

**Rack Rent**—A rent of the full, or nearly the full, annual value of the property out of which it issues. It is defined by sec. 4 of the Public Health Act (38 & 39 Vict. c. 55) as rent which is not less than two-thirds of the full net annual value of the property out of which the rent arises; and the full net annual value is for this purpose taken to be the rent at which the property might reasonably be expected to be let from year to year free from all usual tenants’ rates and taxes and tithe commutation



rent-charge (if any), and deducting therefrom the probable average annual cost of the repairs, insurance, and other expenses (if any) necessary to maintain the same in a state to command such rent.

**Ragged School.**—Under the Sunday and Ragged Schools Act, 1869 (32 & 33 Vict. c. 40), the rating authority may exempt from rates any building, or part of a building, used exclusively as [a Sunday school or] ragged school. The words “may exempt” are discretionary (*Bell v. Crane*, 1873, L. R. 8 Q. B.).

A “ragged school” is defined by the Act (s. 2) to mean “any school used for the gratuitous education of children and young persons of the poorest classes, and for the holding of classes and meetings in furtherance of the same object, and without any pecuniary benefit being derived therefrom, except to the teacher or teachers employed.

**Raid.**—Under sec. 11 of the Foreign Enlistment Act, 1870 (33 & 34 Vict. c. 90), any person who, within the limits of Her Majesty’s dominions and without her licence, prepares or fits out any naval or military expedition against the dominions of a friendly State, is guilty of an offence and punishable by fine and imprisonment, or either of such punishments, at the discretion of the Court before which the offender is convicted, and imprisonment, if awarded, may be either with or without hard labour. All ships and their equipments, and all arms and munitions of war used in or forming part of such expedition, become forfeited to Her Majesty.

It has been held that this offence is sufficiently constituted by the purchase of guns and ammunition in this country and their shipment for the purpose of being put on board a ship in a foreign port, with a knowledge of the purchaser and shipper that they are to be used in a hostile demonstration against such State, though the shipper takes no part in any overt act of war, and the ship is not fully equipped for the expedition within any port belonging to the Queen’s dominions (*R. v. Sandoval*, 1886, 56 L. T. 526; 35 W. R. 500; 51 J. P. 709; 16 Cox C. C. 206 D.). In this case Colonel Sandoval (not a British subject) had bought guns and ammunition in Great Britain and sent them to Antwerp, where they were put on board a vessel which afterwards made an attack upon Venezuela. Colonel Sandoval was found guilty, under sec. 11 of the Act, though before the repeal by the Statute Law Revision Act of 1893 of the preamble, which stated that the Foreign Enlistment Act was for making “provision for the regulation of the conduct of Her Majesty’s subjects *during the existence of hostilities between foreign States* with which Her Majesty is at peace.” Cp. the *Salvador* case under the Foreign Enlistment Act, 1819 (59 Geo. III. c. 69), L. R. 3 P. C. 218. The case of *R. v. Jameson*, [1896] 2 Q. B. 425, was one of a military expedition also falling within sec. 11 of the Act of 1870. The Raid was committed in December 1895 by Dr. Jameson, administrator of the British South Africa Company, and a number of other persons, most of whom were in the Company’s service. Its object was to aid certain other persons supposed to be on the point of rebelling against the South African Republic. Dr. Jameson and his confederates surrendered on 2nd January 1896 to the Boer forces, and on 19th January they were handed over to the British Government. They were tried at the Central Criminal Court, and the ringleaders were sentenced (28th July) to various terms of imprisonment. A motion had been previously brought in the Queen’s Bench



Division to quash the indictment, which alleged that "within the limits of Her Majesty's dominions and after the coming into operation therein of the Act called the Foreign Enlistment Act, 1870," certain offences against the said Act were committed; but it was held by the Court that the indictment sufficiently alleged the Act to have been in operation in that part of Her Majesty's dominions in which the alleged offences were committed ([1896] 2 Q. B. 425).

**Rail, Line of.**—"Line of rail' has, I think, been held to include land covered by an embankment; but a distinction has been made in respect of rating between the line of rail and buildings ancillary to it and necessary for earning profit. Those two subjects are rated differently" (per Erle, J., in *South Wales Rwy. Co. v. Local Board of Health of the Borough of Swansea*, 1854, 24 L. J. M. C. 34; see also *R. v. Mile End Old Town*, 1847, 10 Q. B. Rep. 208).

A company authorised to make a line between two points, and having raised money for that purpose, cannot abandon a portion of the proposed line and apply the money otherwise than for making the whole line (*Cohen v. Wilkinson*, 1849, 12 Beav. 138; *Bagshaw v. Eastern Union Rwy. Co.*, 1849, 7 Hare, 114; see also *Hodgson v. Earl Powis*, 1850, 19 L. J. Ch. 356, 418; *Graham v. Birkenhead, Lancashire, and Cheshire Junction Rwy. Co.*, 1850, 12 Beav. 460).



## Supplemental Notes.

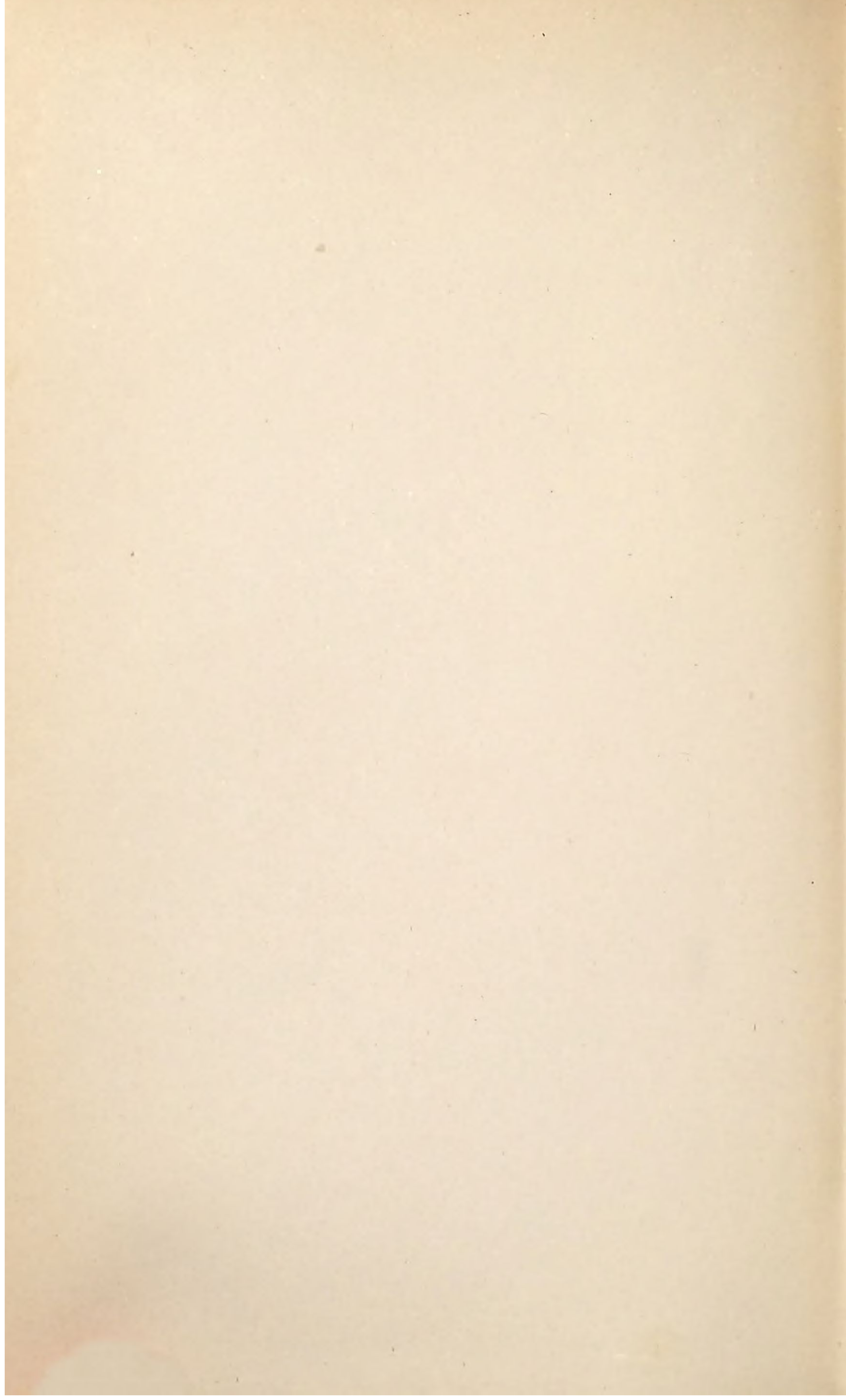
























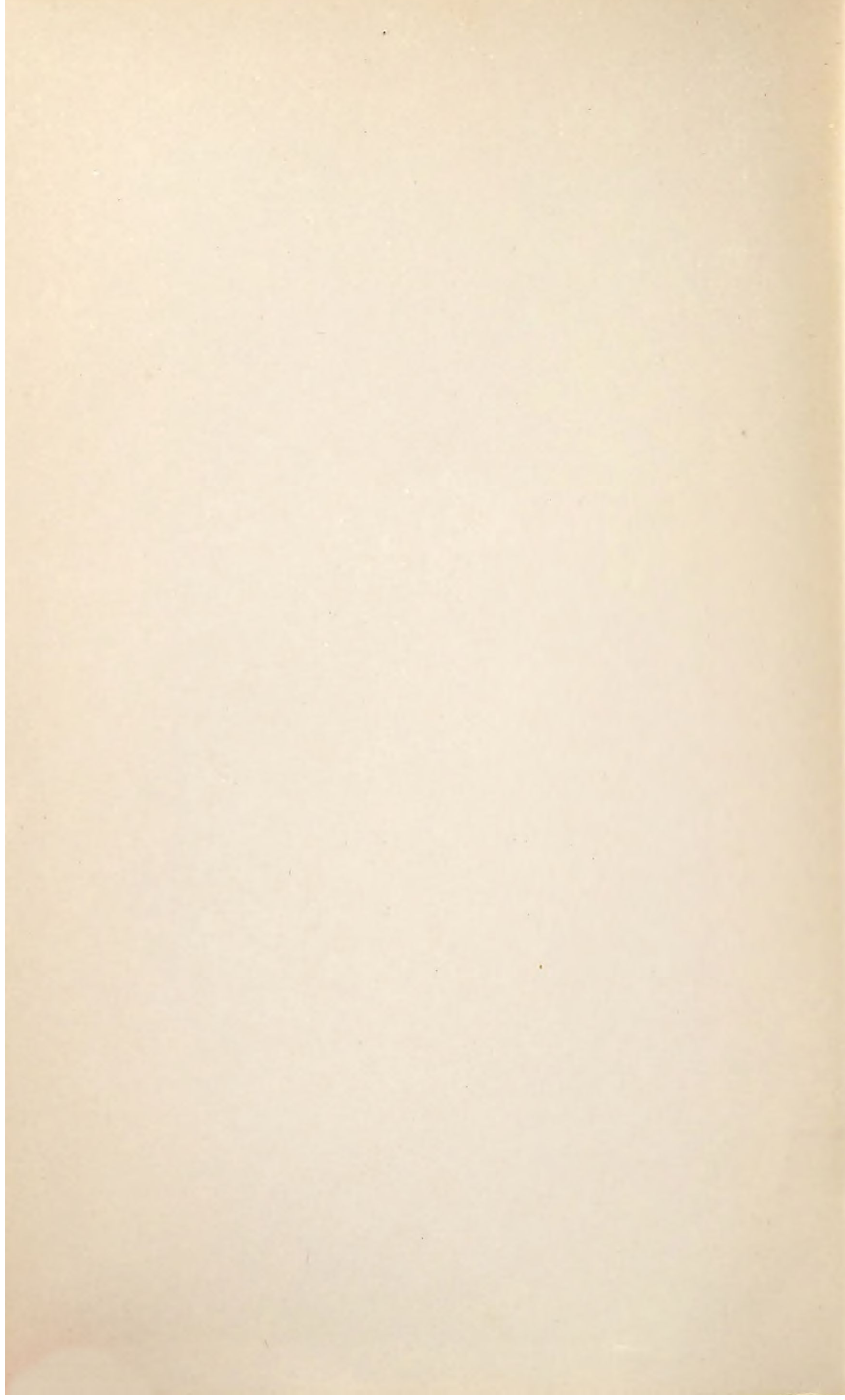












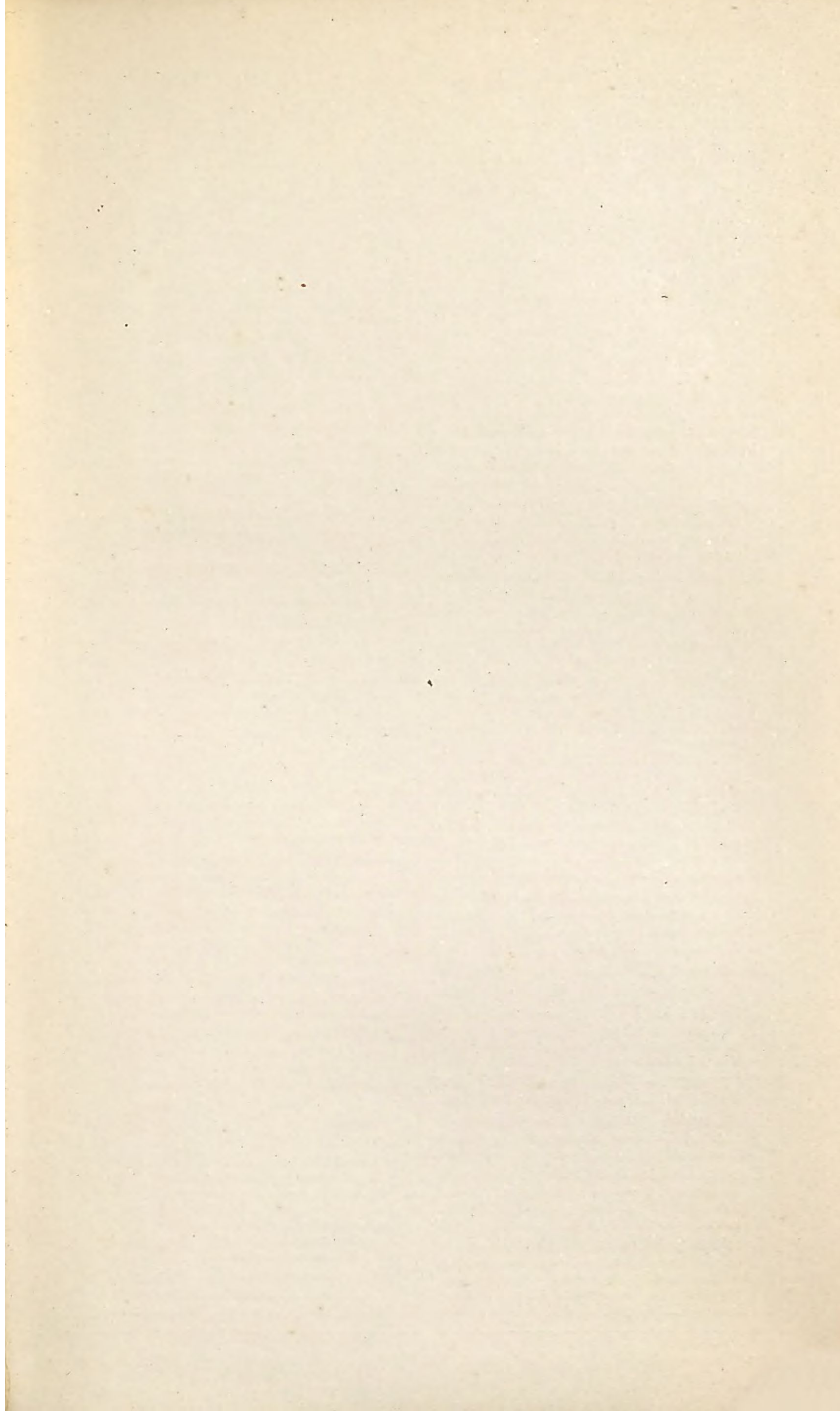












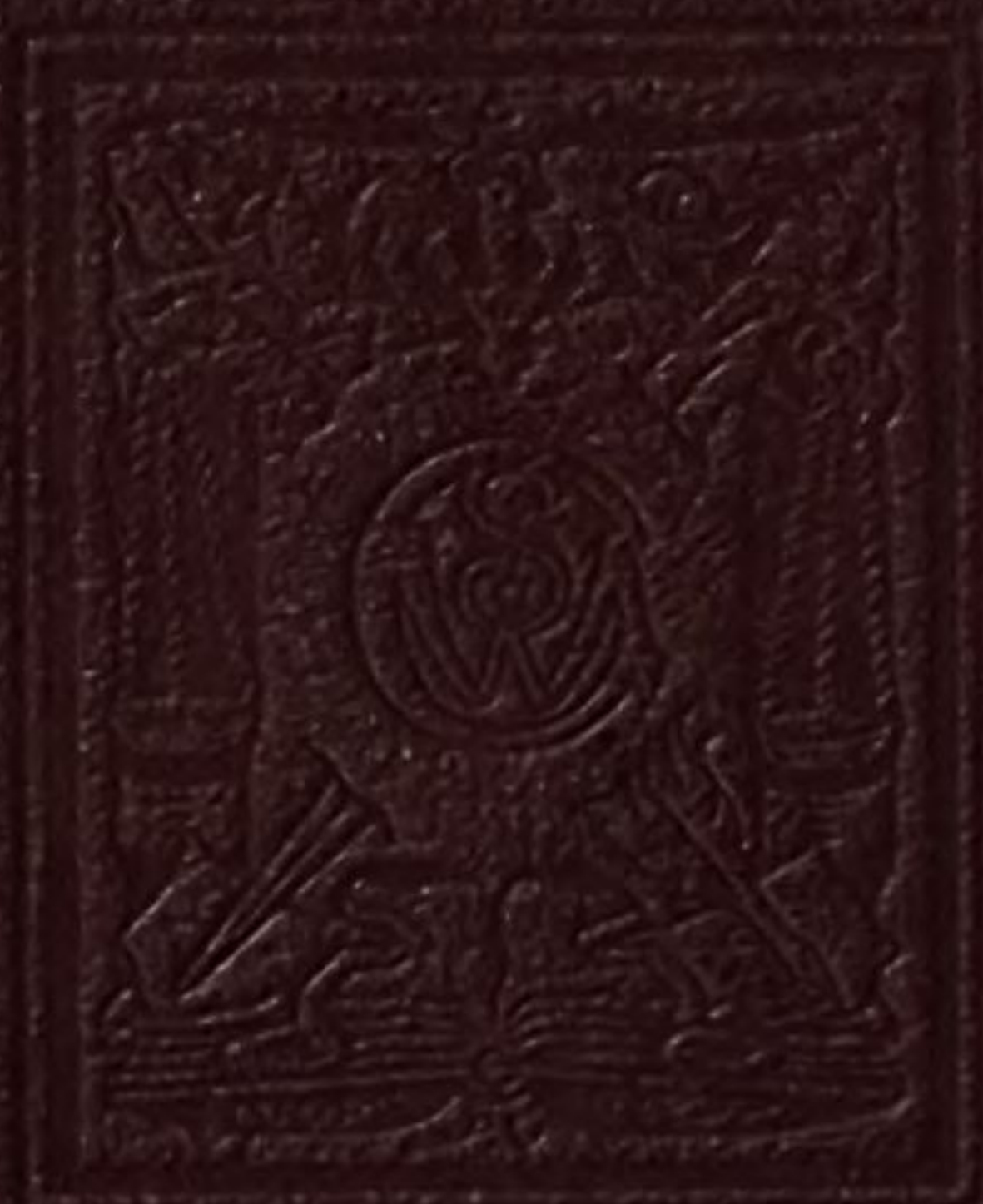


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